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No. _____

In The
Supreme Court of the United States

HAMILTON COUNTY PUBLIC DEFENDER COMMISSION, OFFICE OF THE HAMILTON COUNTY PUBLIC DEFENDER, AND HAMILTON COUNTY, OHIO,
Petitioners,

v.

MICHAEL POWERS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition arises from the Sixth Circuit's application of several long-standing precedents of this Court. In particular, this court's holdings in *Heck v. Humphrey,* 512 U.S. 477 (1994), and *Bearden v. Georgia*, 461 U.S. 660 (1983), are at issue.

Heck v. Humphrey denies a cause of action under 42 U.S.C. § 1983 where success on the claim would imply that a final state court criminal conviction or sentence is invalid unless the state proceedings have been terminated favorably to the claimant. 512 U.S. 477 at 487. *Heck* does not apply to claims which seeking damages only for using the wrong procedures that do not challenge the lawfulness of a conviction or sentence. *Id.* at 482-483. *Bearden v. Georgia* holds that a sentencing court must conduct an inquiry into criminal defendant's ability to pay before revoking probation and imposing incarceration for failing to pay a fine. 461 U.S. 660, 672. The Sixth Circuit's conclusions that *Heck*'s favorable-termination requirement does not apply to habeas-ineligible claimants and that the failure to conduct the inquiry required by *Bearden* relates only to procedure raise the following questions:

1. Does *Heck v. Humphrey's* favorable-termination requirement apply to claimants who have been released from confinement and are therefore ineligible for relief under habeas corpus ?

2. If *Heck v. Humphrey's* favorable-termination requirement applies to persons ineligible for relief under habeas corpus, does the failure of a court to

follow the procedure outlined in both *Bearden v. Georgia* and a parallel state statute mandating an indigency inquiry prior to revoking a criminal defendant's probation and converting an imposed fine to a jail sentence necessarily imply the invalidity the revocation or of the longer period of confinement that resulted from the conversion of the fine?

3. Given the duty placed upon the sentencing court to conduct a *Bearden v. Georgia* indigency inquiry prior to sentencing a criminal defendant to jail for failing to pay a fine, where a court is made aware of circumstances that may affect an offender's ability to pay such a fine, is the failure of the court to conduct the *Bearden* inquiry the sole proximate cause of damages which may result from the lack of a hearing?

RULE 14.1(b) STATEMENT

The Defendants - Appellants and Petitioners are Ohio public entities, the Hamilton County Public Defender Commission, the Office of the Hamilton County Public Defender and Hamilton County, Ohio.

The Plaintiff-Appellee and Respondent is Michael Powers.

RULE 29.6 STATEMENT OF CORPORATE DISCLOSURE

Petitioners are not required to file a Rule 29.6 Statement.

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PETITION FOR A WRIT OF CERTIORARI

The Hamilton County Public Defender Commission, the Office of the Hamilton County Public Defender, and Hamilton County, Ohio respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, dated August 29, 2008, is officially reported at 501 F.3d 592, and is reproduced at App. A., pp 1a – 55a.

The Final Judgment of the United States District Court for the Southern District of Ohio – Western Division dated March 24, 2006, is not reported and is reproduced at App. B, pp 56a – 65a.

The Order of the United States District Court for the Southern District of Ohio – Western Division granting summary judgment to plaintiff as to liability was entered on February 7, 2006. This Order is not reported and is reproduced at App. C, pp 66a – 86a.

The United States District Court for the Southern District of Ohio - Western Division by Order dated August 23, 2005, granted in part and denied in part defendants' motion for summary judgment and certified the matter as a class action. This Order is unofficially reported at 2005 WL 2033696, and is reproduced at App. D, pp 87a – 117a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on August 29, 2007. Petitioners timely sought re-hearing which was denied on January 17, 2008. The order denying re-hearing is set forth at App. E, pp 118a – 119a. This petition is timely under Sup.Ct. Rule 13.3 in that it is being filed within 90 days of the entry of the order denying re-hearing. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision is Section 1 of the Fourteenth Amendment to the United States Constitution. Relevant statutory provisions include 42 U.S.C. § 1983 and § O.R.C. 2947.14 all of which are set forth below:

U.S. Const. amend. XIV § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

O.R.C § 2947.14 Satisfaction of fine and costs; determination of ability to pay must precede commitment; hearing on change of circumstances

(A) If a fine is imposed as a sentence or a part of a sentence, the court or magistrate that imposed the fine may order that the offender be committed to the jail or workhouse until the fine is paid or secured to be paid, or he is otherwise legally discharged, if the court or magistrate determines at a hearing that the offender is able, at that time, to pay the fine but refuses to do so. The hearing required by this section shall be conducted at the time of sentencing.

(B) At the hearing, the offender has the right to be represented by counsel and to testify and present evidence as to his ability to pay the fine. If a court or magistrate determines after considering the evidence presented by an offender, that the offender is able to pay a fine, the determination shall be supported by findings of fact set forth in a judgment entry that indicate the offender's income, assets, and debts, as presented by the offender, and his ability to pay.

(C) If the court or magistrate has found the offender able to pay a fine at a hearing conducted in compliance with divisions (A) and (B) of this section, and the offender fails to pay the fine, a warrant may be issued for the arrest of the offender. Any offender held in custody pursuant to such an arrest shall be entitled to a hearing on the first regularly scheduled court day following the date of arrest in order to inform the court or magistrate of any change of circumstances that has occurred since the time of sentencing and that affects his ability to pay the fine. The right to the hearing on any change of circumstances may be waived by the offender.

At the hearing to determine any change of circumstances, the offender has the right to testify and present evidence as to any portion of his income, assets, or debts that has changed in such a manner as to affect his ability to pay the fine. If a court or magistrate determines, after considering any evidence presented by the offender, that the offender remains able to pay the fine, that determination shall be supported by a judgment entry that includes findings of fact upon which such a determination is based.

(D) No person shall be ordered to be committed to a jail or workhouse or otherwise be held in custody in satisfaction of a fine imposed as the whole or a part of a sentence except as provided in this section. Any person imprisoned pursuant to this section shall receive credit upon the fine at the rate of thirty dollars per day or fraction of a day. If the unpaid fine is less than thirty dollars, the person shall be imprisoned one day.

(E) No commitment pursuant to this section shall exceed six months.

STATEMENT OF THE CASE

In September of 2001, Michael Powers was involved in a traffic accident and arrested for operating a motor vehicle while intoxicated. He was subsequently convicted of reckless operation of a motor vehicle and sentenced in January of 2002. His sentence included a suspended jail term together with fines and court costs. He was ordered to serve a period of probation, with numerous conditions, during which the fine was to be paid. Powers subsequently violated his probation by failing to perform several of the conditions of his probation, including his failure to pay the assessed fine. Powers did not contest that he violated his probation and entered a no contest plea. Following the plea, Powers' probation was revoked and the original sentence was imposed. Prior to the imposition of the sentence, Powers' public defender informed the court that Powers was "homeless and unable to post any bond." App. A, 55a. Nevertheless, the court did not inquire into the reasons why Powers did not pay the fine nor his present ability to do so at the time of the

hearing. At all court hearings through the imposition of his sentence, Powers was represented by attorneys employed by – or under contract with – the public defender of Hamilton County. Powers did not appeal his conviction or sentence and did not pursue state or federal habeas corpus relief. Powers was released from incarceration prior to the expiration of his sentence pursuant to a motion to mitigate the remaining incarceration filed by an attorney not affiliated with the public defender. At the time of his release, Powers had served one day in jail in satisfaction of the fine. Powers was not restored to probation and the case was terminated.

a) District Court Proceedings

In August of 2002, Powers initiated this action claiming damages under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and seeking damages from petitioners and others[1] alleging that he and persons similarly situated had been unlawfully and unconstitutionally incarcerated for failing to pay fines assessed as a result of criminal convictions. In short, Powers' claim directly challenged the fact and duration of his incarceration and impugned its validity. The substance of Powers' claimed violation is that no formal hearing occurred prior to his incarceration

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[1] Petitioners are the only remaining defendants. The sheriff and the board of county commissioners were dismissed on summary judgment. While the Hamilton County was also granted summary judgment, the district court has ordered that it pay costs and damages associated with its final judgment.

under O.R.C. § 2947.14 – which codifies the rule set down by this Court in *Bearden v. Georgia*. App. D, 97a.

Summary judgment was sought by defendants under Rule 56 asserting – in part – that *Heck v. Humphrey* denied a cause of action to Powers and that both *Bearden* and O.R.C § 2947.14 place the duty to inquire into an accused's indigence upon the sentencing court. In August of 2005, the district court denied summary judgment to the Hamilton County Public Defender Commission and the Office of the Public Defender on the § 1983 claims and granted judgment on these claims to the remaining defendants. Summary judgment was granted to all defendants on the state legal malpractice claims. By the same order, the district court certified the matter as a class action. App. D, 117a.

Subsequently, Powers sought summary judgment, filing separate motions regarding liability and damages. The district court granted Powers' motion for judgment on liability in February 2006 and followed in March with a final judgment. In granting summary judgment to Powers, the court found the incarceration to be unlawful and assessed damages against the county based upon its duration, awarding Powers and each proven class member $100 for each day of wrongful incarceration. App. B, 57a.

b) Proceedings in the Sixth Circuit Court of Appeals

An appeal was taken to the United States Sixth Circuit Court of Appeals. The 2-1 decision was issued on August 29, 2007 and is reported at 501 F.3d 592.

App. A, 1a-55a. Among the majority's several holdings are: (1) Powers' claim was not barred by *Heck v. Humphrey*; App. A, 16a-21a; (2) his alleged incarceration for failing to pay the assessed fine without conducting an indigency hearing violated due process; App. A, 26a-27a; and, (3) the public defender was acting under color of state law.[2] App. A, 38a. A timely sought request for re-hearing by petitioners was denied by the Sixth Circuit on January 17, 2008. App E, 118a-119a.

In addressing *Heck*, the majority acknowledged the conflicting decisions among the circuits on whether a favorable termination of the underlying state criminal prosecution is required when a claimant is ineligible for relief under habeas corpus. App. A, 13a-16a. Distinguishing those decisions still applying *Heck* to the exclusion of Judge Souter's concurrence in *Spencer v. Kemna*, 523 U.S. 1, 21 (1998), the majority adopted the position of those circuits which hold that *Heck* does not apply when relief through habeas is unavailable. App. A, 16a-17a. The majority also stated that *Heck* did not apply as Powers' claim fell under *Heck's* procedure exception. App. A, 21a.

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[2] While the majority further held that factual issues precluded summary judgment on the question of whether a policy or custom existed that would establish municipal liability on the public defender commission or the public defender's office, such issues form no part of this petition. The questions presented deal with the interface between the proper application of *Heck v. Humphrey* and *Bearden v. Georgia*. As *Heck* denies a cause of action to § 1983 claimants in defined circumstances, such questions, if answered favorably to petitioners, would mean that Powers did not state a justiciable claim in the first instance.

In dealing with *Bearden,* the majority found that the public defender did not present the municipal judge with any information about Powers's financial status and did not alert the court that Powers' indigency needed to be considered as part of the court's sentencing determination. The majority determined that the failure of the attorney to demand a formal *Bearden* indigency hearing was the proximate cause of Powers' injury. App. A, 34a-35a.

The dissent, on the other hand, pointedly noted that Powers' attorney advised the sentencing court that "Mr. Powers is homeless and can't come up with any bond." App. A, 55a. Believing that this statement – coupled with the fact that Powers was being represented by the public defender – provided sufficient notice to the court that a Bearden inquiry was necessary, the dissent found nothing in the record to support the majority's conclusion that the public defender and not the court caused Powers' injury. App. A, 55a.

A timely petition for re-hearing was denied by the Sixth Circuit on January 17, 2008. App. E, 118a-119a.

c) Jurisdictional Statement

Powers asserted jurisdiction in the United States District Court for the Southern District of Ohio under 28 U.S.C. § 1331 based on allegations arising under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as a result of his incarceration for the non-payment of a criminal fine. Relief was sought under 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

I. This case would allow the Court to resolve the conflict among the several circuit courts of appeal regarding the application of *Heck v. Humphrey* to claims of persons ineligible for relief under habeas corpus.

Heck v. Humphrey, 512 U.S. 477, (1994), restricts the ability of claimants to use 42 U.S.C. §1983 to collaterally attack state criminal convictions or sentencing decisions. *Heck* provides that no claim may be brought under § 1983 which impugns the validity of a conviction or sentence unless it has been set aside, vacated, or called into question through an action in habeas corpus. If success would "necessarily imply" the invalidity of a conviction or sentence, § 1983 claims are barred. *Id.* at 487. *Heck's* oft-repeated holding states:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. §§ 2254. A claim for damages bearing that relationship to a conviction or

> sentence that has not been so invalidated is not cognizable under § 1983.

Id. at 486-487.

While the holding seems to leave little room for doubt, courts in the years since have continued to debate whether *Heck's* favorable termination requirement applies with equal force to claimants who remain state prisoners and those who have been released. Much of the discussion has centered upon the tension between the propositions stated in footnote 10 of the decision providing that the "principle barring collateral attacks . . . is not rendered inapplicable by the fortuity that a convicted criminal is no longer in jail," *id.* at 490, and Justice Souter's position in concurrence that the denial of a federal forum for persons unable to invoke federal habeas jurisdiction to address claimed civil rights violations is "an untoward result." *Id.* at 500.

Intervening pronouncements from this Court have likewise contributed to the tension between those who would apply *Heck* regardless of whether the claimant is eligible for relief in habeas corpus and those who would permit a § 1983 claim to proceed if such relief were unavailable. Justice Souter, concurring in *Spencer v. Kemna,* 523 U.S. 1, 21 (1998), repeated his conclusion that no favorable termination under *Heck* is required of those claimants unable to challenge a conviction or sentence through habeas corpus. Justices O'Connor, Ginsburg, and Breyer joined Justice Souter's concurring opinion, and Justice Stevens stated similar sentiments in his dissent. *Spencer* did not arise under § 1983 and did not

overrule *Heck*. In *Muhammad v. Close*, 540 U.S. 749 (2004), this Court acknowledged that the question remains open indicating that while members of the Court have noted that the unavailability of habeas may dispense with the *Heck* favorable termination requirement, "[t]his case is no occasion to settle the issue." *Id.* at 752 fn 2.

As detailed more fully below, the circuits are fairly divided on whether *Heck's* favorable termination requirement applies to claimants for whom habeas relief is unavailable. Those circuits continuing to apply *Heck*'s favorable termination requirement regardless of whether a claimant is eligible for relief in habeas corpus have shown reluctance to depart from what they view as binding precedent from this Court. The circuits no longer requiring favorable termination of such matters from claimants ineligible for habeas corpus relief generally do so under the theory that where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be. *See eg. Jenkins v. Haubert*, 179 F.3d 19, 26 (2nd Cir., 1999).

a. Circuits Applying *Heck v. Humphrey's* Favorable Termination Requirement to Habeas Ineligible Claimants

As noted by the majority in the current matter, the First, Third, Fifth, and Eighth Circuits all continue to apply *Heck* to bar claims by habeas ineligible plaintiffs. App. A, 13a. The reasons for the ineligibility of the individual claimants in this line of cases vary somewhat among the circuits. The decisions emanating from the Fifth and Eighth Circuits are the closest to the present circumstances as

each involved a released prisoner. The First Circuit decision involved a claim by the family of a deceased prisoner whose habeas petition was rendered moot by his intervening death and the Third Circuit claimant was never jailed but was nonetheless ineligible for habeas relief due to his participation in a pre-trial diversion program. The particulars of each are discussed further below.

In *Figueroa v. Rivera,* 147 F.3d 77, 80 (1st Cir. 1998), the First Circuit dispensed with claims that a strict application of *Heck* worked a "fundamental unfairness" in a case where the claimant was actively attempting to impugn his conviction through habeas corpus when death intervened. The court refused to create an equitable exception under such circumstances as doing so would run "afoul of *Heck*'s core holding: that annulment of the underlying conviction is an element of a section 1983 'unconstitutional conviction' claim . . . [and] would contravene the settled rule that a section 1983 claimant bears the burden of proving all the essential elements of her cause of action." *Id.* The opinion relegated the discussion of *Spencer v. Kemna* to a footnote, indicating that this Court has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court "the prerogative of overruling its own decisions." *Id.* at 81 fn3, quoting *Agostini v. Felton,* 521 U.S. 203, 237 (1997).

The Third Circuit in a more recent case, *Gilles v. Davis,* 427 F.3d 197, 210 (2005), repeated the same sentiments, stating pointedly regarding the concurring

and dissenting opinions in *Spencer*, "we doubt that *Heck* has been undermined." In *Gilles*, the claimant did not go to jail as he participated in a pre-trial diversion program. Successful completion of the program results in dismissal of the criminal charges. Still, the court decided that participation in the program was not a favorable termination as envisioned in *Heck*. Referring to the program as a "court-supervised compromise" the court noted that the program imposed burdens upon a criminal defendant "not consistent with innocence," such as a term of probation, court costs, restitution if applicable, fees associated with the administration of the program, and other conditions as agreed by the parties. *Id.* at 211. More important, perhaps, to the court's decision was the fact that a violation of the terms of the program would result in criminal prosecution. *Id.*

In a case more akin to Power's claim, the Fifth Circuit declined "to announce for the Supreme Court that it has overruled one of its decisions." *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000). Like Powers, Randell was arrested and charged with driving while intoxicated. *Id.* Rather than being incarcerated for failing to pay a fine, Randell apparently was incarcerated for some nine months pursuant to a warrant issued by the Texas Board of Pardons and Paroles on a separate matter, but was not given credit for this time and served it again. *Id.* Following his release, Randall filed an action under § 1983 claiming damages in the amount of $1,000 for each day he served over his sentence. *Id.* The district court dismissed the action as frivolous and the Fifth Circuit, relying on the First Circuit's decision in

Figueroa v. Rivera, determined that *Heck* applied and affirmed the dismissal. *Id.*

Finally, the Eighth Circuit in *Entzi v. Redmann,* 485 F.3d 998, (8th Cir. 2007), relied on *Heck* in affirming the dismissal of the claim of a released inmate that challenged the loss of performance-based, sentence-reduction credits that extended his incarceration by more than one year. After discussion, the court declined to follow *Spencer* stating: "Absent a decision of the Court that explicitly overrules what we understand to be the holding of *Heck,* however, we decline to depart from that rule." *Id.* at 1003.

The majority in this matter dismissed this line of cases concluding that the circuit courts deciding them had lost their way; stating: "[t]hese courts have mistaken the ordinary rule refinement that appellate courts necessarily engage in for an improper departure from binding Supreme Court precedent." App. A, 15a.

b. Circuits Not Applying *Heck v. Humphrey* to Habeas Ineligible Claimants

In abandoning *Heck's* favorable-termination requirement in this matter, the Sixth Circuit majority relied on cases from the Second, Ninth, and Eleventh circuits. App. A, 16a. Noting the brevity of Powers' incarceration, the majority determined that the requirement may not be used to "foreclose a federal review of asserted deprivations of federal rights by habeas-ineligible plaintiffs," and as such *Heck* does not bar Powers' § 1983 claim. App. A, 16a. As with those

circuits continuing to apply *Heck* the factual circumstances vary from case to case.

The Second Circuit concluded in *Leather v. Ten Eyck,* 180 F.3d 420 (1999), that a claimant sentenced only to a fine could proceed with his § 1983 claim as he had never been in state custody and therefore had no remedy in habeas corpus. *Leather* relies on an earlier circuit decision, *Jenkins v. Haubert* 179 F.3d 19 (1999). *Jenkins* was a prison conditions case involving a challenge to the validity of a disciplinary sanction that did not affect the overall length of the prisoner's confinement. *Id.* at 27.

The Ninth Circuit in *Nonnette v. Small,* 316 F.3d 872, 875 (9th Cir., 2002), ruled in favor of a claimant seeking damages for the denial of good time credits under § 1983 who had been released while an appeal of the district court's dismissal of his action was pending and was therefore not eligible for habeas corpus.

In a matter involving a somewhat unusual fact pattern, *Harden v. Pataki,* 320 F.3d 1289 (11th Cir., 2003), the Eleventh circuit held *Heck* did not apply to bar Harden from pursuing a § 1983 claim for damages challenging the validity of the procedures used to extradite him. Harden was extradited by a private extradition company without benefit of hearing or waiver from Georgia to New York to begin serving a prison sentence imposed some fourteen years earlier. The court described this as a "purely procedural

claim," that did not impugn either Harden's prior conviction or the duration of his sentence.[3] *Id.* at 1296.

c. The Necessity for Resolution

The open conflict between these competing lines of cases is incapable of resolution without the involvement of this Court. On the one hand, several circuits continue to consider this Court's holding in *Heck v. Humphrey* as binding precedent and apply it regardless of whether a § 1983 claimant is eligible for relief in habeas corpus. On the other hand, several other circuits, including now the Sixth, express the opinion that a federal forum must always be available – either in habeas corpus or under § 1983 – for the vindication of federally protected rights. These courts have chosen not to consider *Heck's* favorable-termination when a claimant is habeas-ineligible.

This ongoing conflict has also led to the absurd result that final criminal judgments in neighboring states are accorded different levels of comity by the federal judiciary. A § 1983 claim which impugns a state conviction or state sentence in Pennsylvania may not be maintained under any circumstances absent a

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[3] The majority's reliance on this case is interesting given the extensive discussion within it regarding the difference between a purely procedural claim and a claim related to procedure which implies the invalidity of a conviction or sentence. See discussion at 320 F.3d at 1295, fn9. (Claims "are not cognizable under §§ 1983 if they necessarily invalidate, directly or indirectly, an underlying criminal conviction or period of confinement, even if they allege only procedural violations and seek damages only for the procedural violation and not for the substantive result.").

favorable-termination, whereas such a claim may be maintained in Ohio if the claimant is no longer in jail. The resulting situation – where some of the states are more sovereign than others – improperly demeans the final decisions of those state courts in the less sovereign states and undermines their criminal justice systems.

Certiorari is warranted to resolve these irreconcilable positions. If the First, Third Fifth, and Eighth Circuits are correct in their reading and application of *Heck,* then the Second, Sixth, Ninth, and Eleventh Circuits are not engaged in "ordinary rule refinement" and have, in fact, improperly departed from this Court's binding precedent. This Court should affirmatively decide the question of whether *Heck's* favorable-termination requirement applies whenever a § 1983 claim impugns a state conviction or sentence – or – whether such claimant must still be in jail or otherwise eligible for habeas relief for the favorable-termination requirement to apply.

II. The Decision below Misapplies Relevant Precedent from this Court as to When Defects or Omissions in Procedure Necessarily Imply the Unlawfulness of a Conviction or Sentence.

The favorable-termination requirement holding of *Heck v. Humphrey* applies only when a claimant's § 1983 allegations necessarily imply the unlawfulness of a either a conviction or sentence. *Heck,* 512 U.S. 477, 487 (1994). The action may proceed if success on the claim will not demonstrate the invalidity of "*any* outstanding criminal judgment against the plaintiff." *Id.* (Emphasis added). A claim seeking damages

solely for using the wrong procedures that does not challenge the lawfulness of a conviction or sentence is not subject to Heck's favorable- termination requirement. *Id.* at 482-483. This is *Heck's* procedure exception.

In this matter, the essence of Powers' claim is that the sentencing court made no indigency inquiry prior to the revocation of his probation and his subsequent incarceration. This requirement is mandated by this Court's holding in *Bearden v. Georgia,* 461 U.S. 660 (1983). Specifically, *Bearden* holds that prior to revoking probation and imposing a jail term for failing to pay a fine, the sentencing court must inquire into the reasons that the defendant failed to pay the fine. *Id.* at 672. Ohio has codified this requirement in its Revised Code at O.R.C. § 2947.14.

While it is true that both *Bearden* and the Ohio Revised Code prescribe a procedure – the indigency inquiry – what they prohibit is not procedural at all. Both *Bearden* and the Ohio statute explicitly prohibit only attendant results. In the absence of an indigency inquiry, *Bearden* prohibits the conviction – the probation revocation – and any subsequent incarceration imposed as a result. In Ohio, a sentencing court is prohibited from incarcerating a criminal defendant for the purpose of satisfying a fine in any case without conducting an inquiry into his

ability to pay and the reasons, if any, for non-payment. O.R.C. § 2947.14.[4]

Under either, the harm to Powers is not – and has never been – the want of a hearing, but rather the jail sentence he received. This is reflected in the nature of his claim challenging his incarceration, as well as in the order of the district court that determined the incarceration to be unlawful and awarding damages based upon the number of days he served.

Relying primarily on two prisoner cases, *Edwards v. Balisok,* 520 U.S. 641 (1997), and *Wilkinson v. Dotson,* 544 U.S. 74 (2005), the Sixth Circuit majority nevertheless determined that Powers' claim related only to procedure. App. A, 17a-21a.

The majority's reliance on *Wilkinson v. Dotson,* is somewhat curious. The case is so factually distant from Powers' circumstance that it is of limited or no use at all. *Wilkinson* involved challenges by two Ohio prisoners under the Ex Post Facto and Due Process clauses to guidelines and procedures in parole eligibility hearings. *Id.* at 77. Both prisoners sought only declaratory relief related to the guidelines and process, coupled with injunctive relief requiring new parole hearings. *Id.* This Court held that success on a claim that speeds only consideration of a new parole application, or requires new hearing not necessarily resulting in a speedier release from prison, does not

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[4] The Ohio statute is somewhat broader than *Bearden* in that it applies to all defendants and not just those deemed to have violated their probation.

impugn the duration of a sentence and may be pursued in a § 1983 action. *Id.* at 82. Powers did not seek and, in any event, could not have been awarded injunctive relief requiring a new hearing. His obligation is over and he has been discharged. What Powers did seek was a ruling that his incarceration was unlawful and damages based upon its length.

Edwards v. Balisok, 520 U.S. 641 (1997), on the other hand, involved a § 1983 action seeking damages on the grounds that the procedures used in a prison disciplinary hearing resulting in a loss of "good-time" credits violated his due process. Edwards attacked the denial of his opportunity to put on a defense by presenting witnesses possessing exculpatory evidence and the bias of the officer who conducted the hearing. *Id.* at 646-647. Edwards had limited his claim for damages to the deprivation of good-time credits without due process, as opposed to undeservedly as a substantive matter. *Id.* at 645. As framed by this Court, Edwards "posited that the procedures were wrong, but not necessarily that the result was." *Id.* This Court, however, determined that the procedural defects complained of by Edwards would imply the invalidity of the deprivation of his good-time credits and his claim was therefore not cognizable under § 1983. *Id.* at 648.

In the event that *Heck v. Humphrey* applies to habeas ineligible claimants, a proper reading of *Edwards* would likewise bar Powers' claim. Edwards attacked, as did Powers, the specific absence of a procedural protection that led to a longer duration of confinement. The majority in the Sixth Circuit attempts to avoid this obvious conclusion by stating

that success for Powers "would in no way impugn his conviction for reckless driving . . . [and] has nothing to do with the propriety of his underlying conviction." App. A, 19a. In doing so the majority ignores that *Heck* applies with equal force to "any outstanding criminal judgments." In this matter, Powers attacks not his underlying conviction for reckless operation; but rather, the outstanding criminal judgments revoking his probation and his resulting sentence to jail. As such, Powers' claim properly falls within the bar posed by *Edwards* and not outside it.

III. In Determining That the Trial Court Was Not the Proximate Cause of the Harm Befalling Powers, the Sixth Circuit Ignores the Long History of Pronouncements from this Court Placing the Duty of Protecting Criminal Defendant's Rights Firmly upon the Trial Courts Hearing the Criminal Case.

Taking contradictory views, the majority and dissent part ways over the issue of the proximate cause of Powers' injury. The dissent, noting that the court had been advised by Powers' attorney that Powers was "homeless and unable to post any bond," determined that the court had not been misled as to Powers' financial circumstance and its failure to conduct an indigency inquiry severed the chain of causation. App. A, 54a-55a. Despite this statement by Powers' attorney, the majority denied that the sentencing court had received any information regarding Powers' finances and was therefore misled into believing that an inquiry was unnecessary. App. A, 34a. Based upon this premise, the majority held

that the sentencing court's failure to conduct the hearing was not a superseding cause of Powers' injury.

As noted above, *Bearden v. Georgia*, 461 U.S. 660 (1983), places the duty of conducting the inquiry into the indigence of a criminal defendant before revoking his probation for failing to pay a fine squarely upon the sentencing court. The Ohio statute does the same. O.R.C. § 2947.14. Placing the duty of protecting an indigent criminal defendants' rights upon a court as opposed to his attorney or some other entity is not a new development. And the duty of protecting these rights does not depend upon the utterance of magic words or a demand for such protection. *See eg. Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023 (1938) (Constitutional right of an accused to counsel invokes "the protection of a trial court," and "imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."); *Carnley v. Cochran,* 369 U.S. 506, 514-515, (1962)(Trial court's obligation to protect right to counsel does not depend upon a request from the accused); *Swenson v. Bosler,* 386 U.S. 258, (1967)(State appeals court must appoint counsel for indigent defendants on appeals as of right); *Johnson v. United States,* 352 U.S. 565, (1957)(Court of appeals must appoint counsel to challenge certification that any appeal would not be in good faith.); Fed.R. Crim.P. 11(b).

There is no uncertainty in *Bearden* and this Court's other pronouncements on the duties of courts to protect the rights of indigent defendants. This is not surprising for, in this country, these duties are

obligations of sovereignty placed in the "Constitution as essential barriers against arbitrary or unjust deprivation of human rights." *Johnson v. Zerbst,* 304 U.S. 458, 462 (U.S. 1938). In the courtroom, the sovereign is represented by the trial judge – not the defendant's attorney. *See, Polk County v. Dodson,* 454 U.S. 312, 325 (1981)(Public defenders do not act under color of state law in performing a lawyer's traditional function in representing a ciminal defendant.). It is hard to fathom, therefore, how omissions by an attorney representing a criminal defendant necessarily vitiate a court's responsibility to conduct itself in a particular manner.

When it absolved the trial court of its responsibility by placing the burden of protecting Powers' right to an indigency inquiry on his attorney, the Sixth Circuit improperly departed from this Court's holding in *Bearden v. Georgia. Bearden,* 461 U.S. 660 (1983). Certiorari is warranted in this matter to remedy this departure.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-3460

[Filed August 29, 2007]

MICHAEL POWERS, *Plaintiff - Appellee*,

v.

HAMILTON COUNTY PUBLIC DEFENDER COMMISSION, et al., *Defendants - Appellants*.

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.
No. 02-00605—S. Arthur Spiegel, District Judge.

ARGUED: David Todd Stevenson, HAMILTON COUNTY PROSECUTING OFFICE, Cincinnati, Ohio, for Appellants. Robert B. Newman, NEWMAN & MEEKS CO., Cincinnati, Ohio, for Appellee. **ON BRIEF**: David Todd Stevenson, Pamela J. Sears, HAMILTON COUNTY PROSECUTING OFFICE, Cincinnati, Ohio, for Appellants. Robert B. Newman, NEWMAN & MEEKS CO., Cincinnati, Ohio, Stephen R. Felson, Cincinnati, Ohio, for Appellee.

Before: NORRIS, COLE, and CLAY, Circuit Judges.

COLE, J., delivered the opinion of the court, in which CLAY, J., joined. NORRIS, J., delivered a separate dissenting opinion.

OPINION

R. GUY COLE, JR., Circuit Judge. Defendants-Appellants Hamilton County Public Defender Office (the "Public Defender Office") and Hamilton County Public Defender Commission (the "Public Defender Commission") (collectively, the "Public Defender") appeal the judgment of the district court granting class certification and summary judgment to Plaintiff-Appellee Michael Powers. The Hamilton County municipal court ordered Powers to pay a fine in connection with a reckless-driving charge. Powers was subsequently incarcerated for non-payment of that fine. He then filed this § 1983 class action, alleging that his constitutional rights were violated by the Public Defender's policy or custom of failing to seek indigency hearings on behalf of criminal defendants facing jail time for unpaid fines.

For the reasons set forth below, we **AFFIRM** the district court's ruling that Powers's § 1983 claims are cognizable, and **AFFIRM** the grant of class certification. We **REVERSE** the district court's grant of summary judgment to Powers and **REMAND** for further proceedings.

I. BACKGROUND

On January 23, 2002, Powers pleaded no contest in Hamilton County, Ohio municipal court to a charge of reckless operation of a motor vehicle, a fourth-degree misdemeanor. Powers was convicted on the same day and sentenced to thirty days of incarceration. The court suspended twenty-seven of those days and ordered Powers to serve the remaining three days in a driver-intervention program. The court further ordered Powers to pay a $250 fine and court costs.

Two months later, on March 23, 2002, Powers was arrested for violating his probation by, among other things, failing to pay the court-ordered fine. He again pleaded no contest and was found guilty. The court terminated Powers's probation and reinstated his original sentence of thirty days of incarceration, minus credit for one day served. Powers alleges that he served at least one day in the Hamilton County jail for his failure to pay the fine. At oral argument, the Public Defender conceded that Powers spent some portion of his time behind bars exclusively in connection with the unpaid fine.

Attorneys with the Public Defender Office represented Powers at both his January plea and sentencing for the reckless-driving charge, and the March hearing at which his probation was revoked. Powers alleges that he was deprived of an indigency hearing because the Public Defender has a policy or custom of failing to request such hearings when its clients face jail time for non-payment of court-ordered fines.

On August 21, 2002, Powers filed a class-action complaint seeking damages under 42 U.S.C. § 1983 on the theory that his incarceration, in the absence of any inquiry into his ability to pay the court-imposed fine, violated his Fifth, Sixth, and Fourteenth Amendment rights. Powers also asserted a legal-malpractice claim. In his original complaint, Powers named as defendants the Public Defender Office; the Public Defender Commission; and Simon L. Leis, Jr., the Sheriff of Hamilton County (the "Sheriff"). On June 4, 2003, Powers amended his complaint to add as defendants Hamilton County (the "County") and Hamilton County's Board of Commissioners (the "Board of Commissioners").

Powers moved for class certification on August 5, 2003. Defendants moved for summary judgment on November 5, 2003. The district court held a hearing on both motions and issued a joint order on August 23, 2005. The district court granted the Defendants partial summary judgment by dismissing the Sheriff, the County, and the Board of Commissioners and further dismissing Powers's legal-malpractice claim. The district court declined to grant summary judgment as to the Public Defender Office and the Public Defender Commission. The court rejected these Defendants' argument that Powers's § 1983 claims are not cognizable. The court further concluded that the evidence established that the Public Defender "had a well-settled custom or policy of not asking for an indigency hearing before a probationer is incarcerated for failure to pay a fine," and that the Public Defender was a state actor for purposes of § 1983. (District Court's Order [On Plaintiff's Motion For Class

Certification And Defendants' Motion For Summary Judgment] at 13-14.)

After disposing of the Public Defender's motion for summary judgment, the district court went on to grant Powers's class-certification motion. The court concluded that Powers had satisfied all the prerequisites of Federal Rule of Civil Procedure 23(a) and that certification was proper under Rule 23(b)(3) because Powers's case presents questions of law or fact common to the class that predominate over questions affecting only individual class members. Although the court periodically tinkered with the class definition, it ultimately certified a class consisting of

> [a]ll persons who, without an indigency hearing, were committed to the custody of a Hamilton County correctional facility by a Hamilton County municipal or common pleas court from August 21, 2000, to the present in satisfaction of a fine and/or court costs, including persons who violated probation following a "stay to pay" sentence.

(Final Judgment Order at 1.)

Powers subsequently brought his own motion for partial summary judgment on liability, arguing that "the [c]ourt's rejection of Defendants' [summary-judgment] motion clearly establishes liability in his favor and in favor of the class." (Order [On Powers's Motion For Partial Summary Judgment] at 2.) The district court granted Powers's motion. Even though the Public Defender submitted additional evidence to negate the existence of the alleged policy or custom of

failing to request indigency hearings, the district court concluded that the Public Defender's showing was insufficient to raise a genuine issue of material fact.

Finally, the district court approved the content and dissemination of the class notice and claim form, to be sent to a stipulated list of class members via United States mail and published in the *Cincinnati Enquirer*. The court further approved a damage award equal to $100 per day for each day of a class member's incarceration. The court then stayed its judgment pending the resolution of the Public Defender's appeal.

II. DISCUSSION

The Public Defender asserts that the district court erred in several respects. First, the Public Defender argues that the district court was obligated to dismiss Powers's § 1983 suit as barred by the Supreme Court's holding in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). Second, the Public Defender contends that a proper balancing of the relationship between state and federal courts as embodied in the *Younger* abstention doctrine and the *Rooker-Feldman* doctrine precludes Powers's § 1983 claims. Third, the Public Defender argues that the district court erred in granting summary judgment to Powers because (1) it did not cause the deprivation of Powers's rights, (2) it is not a state actor for purposes of § 1983, and (3) the evidence showed at least a disputed question of fact as to the existence of its alleged policy or custom of failing to seek indigency hearings for clients threatened with jail time for the non-payment of fines. Finally, the Public Defender

contends that the district court erred in certifying a class.

We begin by considering whether Powers may even maintain his § 1983 action and then move on to consider whether he is entitled to summary judgment and class certification.

A. Standard of Review

We review the district court's grant of summary judgment de novo. *Watkins v. Battle Creek*, 273 F.3d 682, 685 (6th Cir. 2001). Summary judgment is appropriate where the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Summary judgment is appropriate if a party who has the burden of proof at trial fails to make a showing sufficient to establish the existence of an element that is essential to that party's case." *Beecham v. Henderson County*, 422 F.3d 372, 374 (6th Cir. 2005).

B. Powers's § 1983 Claims Are Cognizable

The Public Defender argues that the district court erred in holding that Powers's § 1983 claims are cognizable. Citing *Heck v. Humphrey*, the Public Defender contends that a § 1983 damages action in connection with an allegedly unlawful conviction or sentence cannot be maintained unless the conviction or sentence has been invalidated. 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). Because the municipal court never set aside Powers's conviction and sentence,

the Public Defender argues that Powers cannot proceed on his § 1983 suit.

Powers responds that *Heck* poses no obstacle to his case for two reasons. First, Powers argues that *Heck* is inapplicable to § 1983 claimants who, like himself, were precluded from challenging the legality of their convictions and sentences through a federal habeas action. Second, Powers argues that his case fits within an exception to *Heck* because he challenges the flawed procedures used to incarcerate him–that is, the lack of an inquiry into his ability to pay the court-ordered fine–and not his underlying conviction for reckless driving or his jail sentence. Powers contends that his procedural attack is analytically distinct from an attack on the municipal court's judgment.

1. Heck's *Favorable Termination Requirement*

Section 1983 establishes tort liability for the deprivation of federal rights by persons acting under color of state law. 42 U.S.C. § 1983 (2007). In *Heck*, the Supreme Court addressed whether an Indiana prison inmate could maintain a § 1983 suit in which he alleged that the defendants (the prosecuting attorney and an Indiana State Police investigator) violated his constitutional rights by conducting an illegal investigation leading to his arrest, destroying exculpatory evidence, and using an illegal voice-identification procedure at his trial. 512 U.S. at 478-79.

The Supreme Court analogized Heck's § 1983 claim to a tort claim for malicious prosecution. *Id.* at 484. An element of a malicious-prosecution claim is a

showing that the plaintiff prevailed in the criminal proceeding that gave rise to the malicious-prosecution lawsuit. The Court noted that this "favorable-termination requirement" protects against the risk of inconsistent judgments that collateral attacks on criminal convictions could otherwise engender. *Id.* at 484-85. Accordingly, the Supreme Court held that a § 1983 damages action in connection with an unlawful conviction or sentence will not lie unless the claimant, like a malicious-prosecution plaintiff, can show that the underlying conviction or sentence has been invalidated:

> [T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

Id. at 486-87. Moreover, the Supreme Court instructed that even if the plaintiff challenges something other than his conviction or sentence, where a ruling in his favor would "necessarily imply the invalidity of his conviction or sentence," the favorable-termination requirement applies:

> [W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider

> whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Id. at 487.

Justice Souter, joined by three of his colleagues, wrote a separate concurrence in *Heck*, in which he expressed the view that the favorable-termination requirement does not preclude § 1983 lawsuits by persons who could not have their convictions or sentences impugned through habeas review. Because petitioners may obtain habeas relief only if they are "in custody," Justice Souter noted that persons "who were merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences" are prohibited from bringing habeas actions to challenge their convictions or sentences. *Id.* at 500. Justice Souter argued that applying *Heck's* favorable-termination requirement to § 1983 claimants in these circumstances would have the effect of altogether denying them a federal forum for the alleged deprivation of their federal rights. He reasoned that such an outcome was impermissible for two reasons. First, applying the favorable-termination requirement to claimants prohibited from seeking habeas relief is inconsistent with broad construction of § 1983 and the statute's purpose of "'interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights.'" *Id.* at 501 (quoting *Mitchum*

v. Foster, 407 U.S. 225, 242, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972)); *accord Dennis v. Higgins*, 498 U.S. 439, 443, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991) (stating that § 1983 "provides a remedy, to be broadly construed, against all forms of official violation of federally protected rights"). Second, Justice Souter argued that absent "unambiguous Congressional direction," the Supreme Court "lacks the authority" to deny a § 1983 cause of action to those who could not pursue habeas relief. *Id.*

In *Spencer v. Kemna*, Justice Souter, again in concurrence, reiterated his conclusion that *Heck's* favorable-termination requirement is inapplicable to those persons prevented from satisfying it "as a matter of law." 523 U.S. 1, 21, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998). *Spencer* was a habeas, not a § 1983, case, in which the Supreme Court held that Spencer's habeas petition was moot because he had completed his term of incarceration. *Id.* at 17-18. Spencer argued that the Court could not dismiss his petition on mootness grounds because, absent a merits adjudication, he could not satisfy *Heck's* favorable-termination requirement, and therefore would be barred from bringing a § 1983 challenge to the alleged deprivation of his constitutional rights. *Id.* at 17.

The Court rejected Spencer's argument. Nonetheless, a majority of the Court agreed with Justice Souter's view that the dismissal of Spencer's habeas petition on mootness grounds did not eliminate Spencer's right to seek § 1983 relief. Justices O'Connor, Ginsburg, and Breyer joined Souter's concurrence and Justice Stevens, in dissent, stated that "it is perfectly clear, as Justice Souter explains,

that he [Spencer] may bring an action under § 1983." *Id.* at 18, 25, n.8; *see also Wallace v. Kato*, 127 S. Ct. 1091, 1101, 166 L. Ed. 2d 973 (2007) (Stevens, J. concurring) (stating that "because a habeas remedy was never available to [petitioner] in the first place," *Heck* did not postpone the accrual of petitioner's § 1983 claim). Justice Souter went so far as to concede that if the dismissal of Spencer's petition actually foreclosed a § 1983 damages action, Spencer would be correct in claiming that dismissal would be improper. *Spencer*, 523 U.S. at 19. But, Spencer's argument failed because he could not challenge his conviction through a habeas proceeding, and therefore he "[was] free to bring a § 1983 action." *Id.*

2. Heck *Is Inapplicable Because Powers Was Foreclosed from Challenging his Incarceration in a Habeas Action*

Drawing on Justice Souter's *Heck* and *Spencer* pronouncements, Powers argues that the favorable-termination requirement is inapplicable to his claims because he has been released from prison. As an initial matter, Powers misstates the nature of the *Heck* limitation that Justice Souter has theorized. What is dispositive in Powers's situation is not that he is no longer incarcerated, but that his term of incarceration–one day–was too short to enable him to seek habeas relief. It seems unlikely that Justice Souter intended to carve out a broad *Heck* exception for all former prisoners. The better reading of his analysis is that a § 1983 plaintiff is entitled to a *Heck* exception if the plaintiff was precluded "as a matter of law" from seeking habeas redress, but not entitled to such an exception if the plaintiff could have sought

and obtained habeas review while still in prison but failed to do so. *See, e.g., Guerrero v. Gates*, 442 F.3d 697, 705 (9th Cir. 2006) (holding that the plaintiff could not "now use his failure timely to pursue habeas remedies as a shield against the implications of *Heck*") (internal quotation marks omitted).

To date, neither we, nor the Supreme Court, have conclusively resolved whether *Spencer* should be construed as limiting the reach of *Heck* such that a § 1983 claimant in Powers's shoes is excepted from the favorable-termination requirement. In *Shamaeizadeh v. Cunigan*, we stated that *Spencer* "clearly excludes from *Heck's* favorable termination requirement former prisoners no longer in custody." 182 F.3d 391, 396 n.3 (6th Cir. 1999). In contrast, in *Huey v. Stine*, we acknowledged the uncertainty generated by *Spencer*, but nonetheless held that *Heck* was still controlling where the plaintiff (an inmate) could not bring a habeas challenge to his thirty-day disciplinary detention because the detention had expired. 230 F.3d 226, 230 (6th Cir. 2000). In *Muhammad v. Close*, however, the Supreme Court reversed *Huey* and stated that "[t]his case is no occasion to settle the issue" of whether *Heck's* favorable-termination requirement applies to § 1983 plaintiffs who are habeas ineligible. 540 U.S. 749, 124 S. Ct. 1303, 158 L. Ed. 2d 32 (2004).

Although we have not yet definitively weighed in on the interplay between *Heck* and *Spencer*, our sister circuits are divided on the question. Four circuits, including the First, Third, Fifth, and Eighth Circuits, have rejected Justice Souter's analysis and instead have held that § 1983 claimants must comply with *Heck's* favorable-termination requirement even if

habeas relief was unavailable to them. These courts have reasoned that to recognize an exception to *Heck* along the lines sketched by Justice Souter would amount to an impermissible deviation from Supreme Court precedent.

In *Figueroa v. Rivera*, for example, the appellants brought a § 1983 action on behalf of a convicted murderer, Rios, who had died in prison. 147 F.3d 77, 79 (1st Cir. 1998). Rios had filed a habeas petition in federal district court but the district court dismissed it as moot following his death. *Id.* at 79-80. The First Circuit acknowledged that Rios "was attempting to impugn his conviction when death intervened," but it nonetheless determined that *Heck* barred the appellants' § 1983 suit because Rios's conviction had not been set aside in a prior proceeding. *Id.* at 80-81. Even though *Spencer* "may cast doubt upon the universality of *Heck's* 'favorable termination' requirement," the First Circuit reasoned that it was bound to apply Supreme Court precedent, "even if that precedent appears weakened by pronouncements in its subsequent decisions," because only the Supreme Court has the authority to overrule its own decisions. *Id.* at 81 n.3 (citing *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)); *see also Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) (declining to read *Spencer* to allow a former prisoner to maintain his § 1983 action on the grounds that *Heck* did not differentiate between prisoners and habeas-ineligible former prisoners for purposes of applying the favorable-termination rule and no Supreme Court decision had "explicitly overrule[d]" *Heck*); *Gilles v. Davis*, 427 F.3d 197, 209-10 (3d Cir. 2005) (declining to recognize a *Heck* exception for a habeas-ineligible

plaintiff on the grounds that the court had no authority to question *Heck's* "continued validity"); *Randell v. Johnson*, 227 F.3d 300, 301-02 (5th Cir. 2000) (declining to recognize a *Heck* exception for a § 1983 plaintiff who was no longer imprisoned because it is not the prerogative of a lower federal court to "announce for the Supreme Court that it has overruled one of its decisions").

We disagree with the reasoning of our sister circuits who have decreed themselves bound by *Heck* to the exclusion of Justice Souter's comments in his *Heck* and *Spencer* concurrences. These courts have mistaken the ordinary rule refinement that appellate courts necessarily engage in for an improper departure from binding Supreme Court precedent. The *Heck* Court was not confronted with a factual scenario like Powers's, in which the § 1983 claimant has no recourse in habeas and thus cannot have his conviction or sentence set aside by a federal court. The plaintiff in *Heck* was still incarcerated and so could have sought habeas relief. Thus, adopting Justice Souter's rationale does not amount to a failure to follow *Heck* where *Heck* offered no binding guidance on the application of the favorable-termination requirement to the circumstances here. Moreover, the only way to side with those circuits that have enforced the favorable-termination requirement against habeas-ineligible plaintiffs is to altogether ignore *Spencer*, in which five justices (four in concurrence and one in dissent) agreed that *Heck* did not extend that far. Casting *Spencer* aside is something we decline to do.

We are persuaded by the logic of those circuits that have held that *Heck's* favorable-termination

requirement cannot be imposed against § 1983 plaintiffs who lack a habeas option for the vindication of their federal rights. Most analogous to Powers's case is *Leather v. Ten Eyck*, in which the Second Circuit concluded that the plaintiff's § 1983 suit could proceed despite non-compliance with the favorable-termination requirement because the plaintiff had been assessed only a monetary fine in his criminal proceeding and thus was ineligible for habeas relief. 180 F.3d 420, 424 (2d Cir. 1999). The Ninth and Eleventh Circuits also have dispensed with the favorable-termination requirement where habeas is unavailable. *See Nonnette v. Small*, 316 F.3d 872, 875-77 (9th Cir. 2002) (declining to apply the favorable-termination requirement where the plaintiff could not pursue habeas relief because he had been released from jail); *Harden v. Pataki*, 320 F.3d 1289, 1298-99 (11th Cir. 2003) (declining to apply the favorable-termination requirement where the plaintiff could not pursue habeas relief to challenge extradition procedures because the plaintiff had already been extradited).

These Circuits have the better-reasoned view. Powers was fined for his reckless-driving misdemeanor and then imprisoned for at least one, but not more than thirty, days for his failure to pay the fine. Under these circumstances, there is no way that Powers could have obtained habeas review of his incarceration. This is precisely the kind of situation that Justice Souter had in mind when he argued in *Heck* and *Spencer* that the favorable-termination requirement could not be deployed to foreclose federal review of asserted deprivations of federal rights by habeas-ineligible plaintiffs. Accordingly, we join the Second, Ninth, and Eleventh Circuits in holding that the favorable-

termination requirement poses no impediment to Powers's § 1983 claims.

3. Heck *Is Inapplicable Because Powers Challenges the Procedures that Led to his Incarceration, and not his Underlying Conviction or the Duration of his Sentence*

Besides being exempt from *Heck's* favorable-termination requirement because he could not have obtained habeas relief, we hold that Powers is exempt for a second reason. We agree with the district court's conclusion that Powers need not comply with the favorable-termination requirement because he alleges that his constitutional rights were violated as a result of improper procedures, not that his underlying conviction or jail sentence was improper. In two cases following *Heck*, the Supreme Court distinguished between § 1983 challenges to judgments and § 1983 challenges to the procedures that led to those judgments.

In *Edwards v. Balisok*, Edwards was a state prison inmate who filed a § 1983 action on the grounds that the procedures used in a prison disciplinary hearing deprived him of his due-process rights because the hearing officer was improperly biased against him. 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997). The Court described Edwards's claim as "posit[ing] that the procedures were wrong, but not necessarily that the result was." *Id.* at 645. Moreover, the Court stated that "[t]he distinction between these two sorts of claims is clearly established in our case law . . . ." *Id.*

Although the Court approved of an analytical framework that would remove procedure-based challenges from *Heck's* ambit, it nonetheless concluded that Edwards's claim was not cognizable. The Court held that if Edwards prevailed in his § 1983 suit by proving that the hearing officer was indeed biased against him, such an outcome would implicitly negate the judgment in the disciplinary proceeding, even if there otherwise was sufficient evidence to support that judgment. *Id.* at 647. This was true because "[a] criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him." *Id.* Thus, *Balisok* cautions courts to scrutinize "the nature of the challenge to the proceedings" because even challenges to procedures "could be such as necessarily to imply the invalidity of the judgment." *Id.* at 645.

In *Wilkinson v. Dotson*, the Supreme Court affirmed the en banc judgment of this Court, giving the green light to two § 1983 cases challenging parole-hearing procedures. 544 U.S. 74, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005). The plaintiffs in *Wilkinson* were two Ohio inmates serving lengthy jail sentences. *Id.* at 76. Both were denied parole on the basis of 1998 parole guidelines but argued that the guidelines in effect in the year in which they were convicted should have been used instead. *Id.* at 76-77. One plaintiff further argued that there were too few board members present at his parole hearing and that he was denied an opportunity to speak. *Id.* at 77. The plaintiffs alleged that these procedures violated the Constitution's Ex Post Facto and Due Process Clauses. *Id.* at 76-77.

The Supreme Court held that the suits could proceed in part because if the prisoners were successful, they would be entitled only to new parole hearings at which constitutionally proper procedures would be used (the prisoners sought declaratory and injunctive relief, not damages). *Id.* at 82. Success did not "necessarily imply the invalidity of their convictions or sentences," or for that matter, of the parole board's judgment declining to release them. *Id.*

Balisok and *Wilkinson* establish that Powers need not comply with *Heck's* favorable-termination requirement. To prevail in his § 1983 suit, Powers must show that he was not afforded an indigency hearing to which he had a constitutional right before being committed to jail. If he succeeds, the resulting judgment in his favor would in no way impugn his conviction for reckless driving. A conclusion that the procedures, or rather the lack of procedures, that culminated in Powers's incarceration violated his constitutional rights has nothing to do with the propriety of his underlying conviction. Indeed, the only aspect of Powers's criminal proceedings that could possibly be regarded as vulnerable to a collateral judgment of invalidity is the municipal court's order sending Powers to jail for non-payment of the fine. Even here, however, if Powers succeeds in his § 1983 suit, that means only that the failure to grant Powers an indigency hearing was wrongful, not that the order committing him to jail was wrongful. *See McKithen v. Brown*, 481 F.3d 89, 102-03 (2d Cir. 2007) (holding that the favorable-termination requirement did not bar a § 1983 action seeking DNA testing of evidence because if the plaintiff prevailed on his § 1983 claims, he would be entitled only to production of the evidence

for testing, and "[s]uch testing, of course, '*necessarily* implies nothing at all about the plaintiff's conviction'") (quoting *Harvey v. Horan*, 285 F.3d 298, 308 (4th Cir. 2002)); *see also Ballard v. Burton*, 444 F.3d 391 (5th Cir. 2006) (holding that the favorable-termination requirement did not bar a § 1983 claim for excessive force because a conclusion that the defendant's use of force was objectively unreasonable would not necessarily call into question the plaintiff's criminal conviction for assault). Powers's incarceration is not "necessarily invalid" because Powers may have willfully refused to pay a fine he was capable of paying, rather than having been actually impecunious. *Nelson v. Campbell*, 541 U.S. 637, 647, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004) ("[W]e were careful in *Heck* to stress the importance of the term 'necessarily.'"). This we cannot guess at precisely because Powers did not get an indigency hearing.

Decisions from other Circuits holding that *Heck* does not bar § 1983 challenges to extradition procedures support Powers's position. In *Harden*, for example, the plaintiff argued that he was extradited from Georgia to New York in violation of his due-process rights because he was denied a pre-extradition habeas hearing. *Harden*, 320 F.3d at 1292. In addition to concluding that the favorable-termination requirement did not apply because Harden was prevented from seeking habeas relief (the extradition had already occurred), the Eleventh Circuit held that "*Heck* does not bar purely procedural claims brought under § 1983." *Id.* at 1295. Harden's claims were procedural in nature because if he succeeded in proving that the extradition procedures were unconstitutional, that did not mean his conviction and

sentence for the crime for which he was extradited were invalid: "[E]xtradition *procedures*, even if they violate federal rights, have no bearing, direct or implied, on the underlying guilt or innocence of the person extradited." *Id.* at 1297; *see also Weilburg v. Shapiro*, 488 F.3d 1202 (9th Cir. 2007) (holding that because the plaintiff's allegations challenging the procedures used to extradite him from Arizona to Illinois would not affect his underlying conviction, *Heck* did not apply). The same rationale applies to Powers's situation. The Public Defender's alleged practice of not requesting indigency hearings has no bearing on Powers's guilt or innocence in failing to pay his court-ordered fine.

Accordingly, we hold that because Powers challenges the procedures that led to his incarceration and not the incarceration itself, Powers need not comply with the favorable-termination requirement.

C. Powers's § 1983 Action is not Barred by the *Younger* Abstention Doctrine or the *Rooker-Feldman* Doctrine

The Public Defender argues that considerations of comity require the dismissal of Powers's § 1983 claims. Invoking the *Younger* abstention doctrine and the *Rooker-Feldman* doctrine, the Public Defender says that allowing Powers's case to proceed will upset the proper relationship between the federal and state courts by permitting undue federal intrusiveness into the final judgments of a state court. The Public Defender is wrong.

The *Younger* abstention doctrine prevents federal courts from "stay[ing] or enjoin[ing] pending state court proceedings except under special circumstances." *Younger v. Harris*, 401 U.S. 37, 41, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). *Younger* only comes into play when three requirements are satisfied, including that there is an "on-going state judicial proceeding[]" running parallel to the federal action. *Squire v. Coughlan*, 469 F.3d 551, 555 (6th Cir. 2006). Here, Powers's proceedings in the state court have long since concluded and he has no competing action pending there. The *Younger* abstention doctrine therefore is inapplicable because there are no proceedings in the state courts for the federal courts to defer to.

The *Rooker-Feldman* doctrine bars parties that have lost in state court from filing suit in federal district courts for the purpose of obtaining review of the adverse state-court judgments. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); *Johnson v. De Grandy*, 512 U.S. 997, 1005-06, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994) (*Rooker-Feldman* prevents an unsuccessful state-court party "from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights").

The *Rooker-Feldman* doctrine has no bearing on Powers's claims because he does not allege that he was deprived of his constitutional rights by the state-court judgment, but rather by the Public Defender's conduct in failing to ask for an indigency hearing as a

prerequisite to his incarceration. Assertions of injury that do not implicate state-court judgments are beyond the purview of the *Rooker-Feldman* doctrine. *See McCormick v. Braverman*, 451 F.3d 382, 392-93 (6th Cir. 2006) (holding *Rooker-Feldman* inapplicable because the plaintiff did not attack the state-court judgments but "assert[ed] independent claims that those state court judgments were [improperly] procured by" the defendants); *Todd v. Weltman, Weinberg, & Reis Co., L.P.A.*, 434 F.3d 432, 436-37 (6th Cir. 2006) (holding *Rooker-Feldman* not triggered because the plaintiff did not allege that he was injured by the state-court judgment, but instead filed an independent federal claim that he was injured by the defendant's filing of a false affidavit in the state-court proceeding).

For these reasons, we reject the Public Defender's *Younger* and *Rooker-Feldman* arguments.

D. The District Court Erred in Granting Summary Judgment for Powers

In this section, we consider whether Powers is entitled to summary judgment in light of the requirements for establishing a § 1983 municipal-liability claim. We agree with Powers (1) that he has alleged a violation of a right protected by the Constitution, (2) that the Public Defender caused the alleged violation, and (3) that the Public Defender acted under color of state law in doing so. However, we reverse and remand the district's court grant of summary judgment because we conclude that, even assuming Powers has carried his evidentiary burden with respect to showing that the Public Defender has

a policy or custom of failing to request indigency hearings, the Public Defender has raised a genuine question of material fact about the existence of the purported policy or custom, making summary judgment for Powers inappropriate.

1. *The Requirements of a § 1983 Municipal-Liability Claim*

Section 1983 imposes liability against

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . .

42 U.S.C. § 1983.

"[We] engage[] in a two-pronged inquiry when considering a municipal-liability claim." *Cash v. Hamilton County Dep't of Adult Prob.*, 388 F.3d 539, 542 (6th Cir. 2004). We first ask whether the plaintiff has asserted the deprivation of a right guaranteed by the Constitution or federal law. *Id.*; *Alkire v. Irving*, 330 F.3d 802, 813 (6th Cir. 2003). Second, we analyze whether the alleged deprivation was caused by the defendants acting under color of state law. *Cash*, 388 F.3d at 542; *Alkire*, 330 F.3d at 813.

A municipality cannot be liable for the constitutional torts of its employees; that is, it cannot

be liable on a *respondeat superior* theory. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Rather, liability will attach only where the plaintiff establishes that the municipality engaged in a "policy or custom" that was the "moving force" behind the deprivation of the plaintiff's rights. *Id.* at 694; *see also Doe v. Claiborne County*, 103 F.3d 495, 507 (6th Cir. 1996) ("Under *Monell*, the [defendants] cannot be found liable unless the plaintiff can establish that an officially executed policy, or the toleration of a custom . . . leads to, causes, or results in the deprivation of a constitutionally protected right.").

The *Monell* Court described a municipal policy as including "a policy statement, ordinance, regulation, or decision officially adopted and promulgated . . . ." 436 U.S. at 690. An actionable "custom," in contrast, "has not received formal approval through . . . official decisionmaking channels." *Id.* at 690-91. A § 1983 plaintiff may establish the existence of a custom by showing that policymaking officials knew about and acquiesced in the practice at issue. *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 902, 86 Fed. Appx. 137 (6th Cir. 2004).

Where a municipal-liability claim is premised on an "inaction theory," the plaintiff must prove (1) the existence of a clear and persistent pattern of violating federal rights (in this case, failing to request indigency hearings); (2) notice or constructive notice on the part of defendants; (3) the defendants' tacit approval of the unconstitutional conduct, such that their deliberate indifference in failing to act can be said to amount to

an official policy of inaction; and (4) that the defendants' custom was the "moving force," or direct causal link for the constitutional deprivation. *Doe*, 103 F.3d at 508; *see also Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005) (applying *Doe* factors where the plaintiff alleged that the Chattanooga police department had a custom of tolerating the use of excessive force against detained suspects); *Garretson v. City of Madison Heights*, 407 F.3d 789, 796 (6th Cir. 2005) (applying *Doe* factors where the plaintiff alleged that the city had a custom of failing to provide medical treatment to pre-arraignment detainees).

2. *Powers Has Asserted the Deprivation of a Federal Right*

Powers alleges that the Public Defender's failure to request an inquiry into his ability to pay the court-ordered fine before he was jailed violated his Fifth, Sixth, and Fourteenth Amendment rights. Under the first prong of a § 1983 municipal-liability claim, we must evaluate whether these rights are federally protected such that, if proven, § 1983 will provide relief for their infringement. *See Doe*, 103 F.3d at 506 (stating that the Court's task was to "examin[e] the nature of the right claimed to have been infringed upon"–the right to be free from sexual abuse at the hands of a state actor–to determine whether it was embodied by the Fourteenth Amendment); *Cash*, 388 F.3d at 542 (commenting that "[t]here can be little doubt" that the plaintiff homeless persons had a constitutionally protected right in their personal belongings, which were taken and discarded pursuant to a municipal program).

The Public Defender does not dispute that Powers has satisfied the first prong of establishing § 1983 liability, nor can it: In *Bearden v. Georgia*, the Supreme Court held that a state may not "impose a fine as a sentence and then automatically convert it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." 461 U.S. 660, 667, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983). The *Bearden* Court went on to hold that "fundamental fairness" requires a court to inquire into whether a criminal defendant is able to pay a fine. *Id.* at 673; *see also Alkire*, 330 F.3d at 816-17 (citing *Bearden* and holding that a criminal defendant's right to a judicial inquiry into his ability to pay a fine is well established by the Fourteenth Amendment). Ohio has codified this requirement at Ohio Revised Code ("O.R.C.") § 2947.14, which provides that a hearing as to the offender's ability to pay the fine shall be conducted at the time of sentencing and that a court's conclusion that the offender is able to pay "shall be supported by findings of fact set forth in a judgment entry that indicate the offender's income, assets, and debts . . . ." *See also State v. Meyer*, 124 Ohio App. 3d 373, 706 N.E.2d 378 (Ohio Ct. App. 1997) (holding that the duty to conduct a hearing is not triggered until the court seeks to enforce the imposition of a fine by ordering the defendant imprisoned).

Because there is no dispute that Powers has asserted the deprivation of a federal right, the next and more complex question is whether the Public Defender caused Powers's injury.

3. *The Public Defender Was the "Moving Force" Behind the Violation of Powers's Constitutional Rights*

As described above, a § 1983 plaintiff must show that the defendant was the "moving force" behind the alleged deprivation of his federal rights. *Monell*, 436 U.S. at 694. At bottom, this is a causation inquiry, requiring the plaintiff to show that it was the defendant's custom or policy that led to the complained of injury. *Garner*, 8 F.3d 358, 363-64 (6th Cir. 1993).

Traditional tort concepts of causation inform the causation inquiry on a § 1983 claim. *McKinley v. City of Mansfield*, 404 F.3d 418, 438 (6th Cir. 2005). Thus, we must consider whether the Public Defender's failure to request an indigency hearing was both the cause in fact and the proximate cause of the denial of Powers's right to an indigency hearing prior to his incarceration for the unpaid fine.

(a) *Cause in Fact*

First, we have no trouble concluding that the Public Defender's failure to act was the cause in fact of Powers's injury. Cause in fact is typically assessed using the "but for" test, which requires us to imagine whether the harm would have occurred if the defendant had behaved other than it did. David W. Robertson, *The Common Sense of Cause in Fact*, 75 Tex. L. Rev. 1765, 1768-69 (1997). "Conduct is the cause in fact of a particular result if the result would not have occurred but for the conduct. Similarly, if the result would have occurred without the conduct complained of, such conduct cannot be a cause in fact

of that particular result." *Butler v. Dowd*, 979 F.2d 661, 669 (8th Cir. 1992).

Here, "but for" the Public Defender's failure to move for an indigency hearing, Powers would have received a hearing. Of course, we cannot conclude with absolute certainty that the municipal court would have granted Powers's motion. Robertson, 75 Tex. L. Rev. at 1774 (commenting that a showing of cause in fact does not require mathematical proof). Neither can we presume, however, that had the Public Defender advised the court that the Constitution forbids the jailing of a defendant on a fine without a judicial determination as to the defendant's ability to pay, that the court would have ignored this command. For these reasons, we conclude that the Public Defender was the cause in fact of the deprivation of Powers's rights.

(b) *Proximate Cause*

The thornier question is whether the Public Defender's failure to act proximately caused Powers's injury. Proximate cause "is not about causation at all but about the appropriate scope of responsibility." Dobbs on Torts § 181. Proximate-cause analysis is a kind of line-drawing exercise in which we ask whether there are any policy or practical reasons that militate against holding a defendant liable even though that defendant is a but-for cause of the plaintiff's injury. *Id.*

The Supreme Court has stated that "§ 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" *Malley v. Briggs*, 475 U.S. 335, 345, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (quoting

Monroe v. Pape, 365 U.S. 167, 187, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961)). Relying on this language, courts have framed the § 1983 proximate-cause question as a matter of foreseeability, asking whether it was reasonably foreseeable that the complained of harm would befall the § 1983 plaintiff as a result of the defendant's conduct. Even if an intervening third party is the immediate trigger for the plaintiff's injury, the defendant may still be proximately liable, provided that the third party's actions were foreseeable. *See, e.g., Kerman v. City of New York*, 374 F.3d 93, 126-27 (2d Cir. 2004) (holding that even where it was a hospital's doctors who decided to admit the plaintiff for psychiatric observation, the police officer who took the plaintiff to the hospital was nonetheless subject to liability under § 1983 because it was foreseeable that the plaintiff would be detained at the hospital as a result of the officer's taking him there); *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1072-74 (2d Cir. 1996) (holding that in recommending that the plaintiff be sentenced to an alcohol-treatment program that incorporated religious elements, a probation department could be held liable under § 1983 for violating the plaintiff's First Amendment rights, even though a judge made the sentencing decision).

Powers argues that it was reasonably foreseeable that he would be jailed without an indigency hearing when his counsel did not move for such a hearing, and that therefore the Public Defender was the proximate cause of his injury. In contrast, the Public Defender argues that the duty to hold the indigency hearing rested exclusively with the municipal judge, irrespective of the quality of the Public Defender's

representation. Therefore, contends the Public Defender, the municipal judge was the "moving force" behind the violation of Powers's rights.[1]

We reject the Public Defender's attempt to evade liability by shifting to the municipal judge all responsibility for the alleged infringement of Powers's rights. As an initial matter, courts do not typically issue rulings on matters not brought to their attention by the parties, and in some instances, it may even be improper for courts to do so. *Galvan v. Ala. Dep't of Corr.*, 397 F.3d 1198, 1204 (9th Cir. 2005) ("Courts generally do not decide issues not raised by the parties."). Moreover, busy judges, faced with lengthy and growing dockets, necessarily must rely on litigants to present the relevant facts and law governing the disputes that the judges are asked to resolve. Powers is therefore right when he contends that the Public Defender's silence about his asserted indigency made it reasonably foreseeable that he would be jailed for non-payment of his fine without having received an indigency hearing.

We recognize that in some circumstances, the actions of a judge may sever the chain of causation between a plaintiff's injury and a defendant's wrongdoing. *See, e.g., Townes v. City of New York*, 176 F.3d 138, 146 (2d Cir. 1999) (holding that police

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[1] Powers did not sue the municipal court judge who ordered him jailed presumably because any such claim would have been dismissed since judges enjoy absolute immunity for actions carried out pursuant to their official duties. *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

officers could not be held liable for an illegal search and seizure because the plaintiff's injury was proximately caused by the trial judge's error in failing to suppress the seized evidence). Thus, even if it is foreseeable that a defendant's conduct will lead to the complained of harm, a defendant may be able to avoid § 1983 liability by pointing to the intervening action of a judge as the proximate cause of the plaintiff's injury. This rule has grown out of the general tort principle that "an intervening act of a third party, which [causes harm] after the first person's wrongful act has been committed, is a superseding cause which prevents the first person from being liable [even though the first person's conduct] was a substantial factor in bringing about" the harm. *Egervary v. Young*, 366 F.3d 238, 246 (3d Cir. 2004) (citing Restatement (Second) of Torts § 440-41 (1965)).

To determine whether a judicial act constitutes a superseding cause that relieves a defendant of liability, our sister circuits have distinguished between judicial orders that are predicated on the misrepresentation or omission of material facts, on the one hand and, on the other hand, judicial orders that are made after a full presentation of the facts, but are nonetheless legally erroneous. In the first case, the inaccurate portrayal of the factual circumstances subjects the defendant to § 1983 liability. Only in the latter case, where the defendant has fully apprised the judge of the material facts, but the judge has misapplied the law, will the defendant be shielded from liability. Two cases illustrate the point.

In *Egervary*, the plaintiff father brought a *Bivens* action (the § 1983 counterpart for actions against

federal officials) against the defendants, his estranged wife's attorneys. The plaintiff argued that the defendants violated his due-process rights by persuading a judge to enter an order authorizing the removal of the plaintiff's son to Hungary, where the plaintiff's wife was living, in the absence of any hearing at which the plaintiff could contest the loss of custody. The Third Circuit stated that "[t]he purported misrepresentation here . . . is a legal one and not an inadequate or false representation of the factual basis upon which the legal ruling depended." *Egervary*, 366 F.3d at 249. Because the judge had not been "misled in some manner as to the relevant facts," but instead had made a legal error for which "the judge and the judge alone was responsible," the *Egervary* Court held that the judge's order constituted a superseding cause that broke the chain of causation, thereby preventing the defendants from being held liable.

Similarly, in *Murray v. Earle*, the plaintiff brought suit on the grounds that the defendants violated her Fifth Amendment rights by illegally interrogating her. 405 F.3d 278 (5th Cir. 2005). The defendants argued that they could not be held liable because the plaintiff's injury was proximately caused by the trial judge's decision to admit her confession into evidence, not their unlawful interrogation. The Fifth Circuit agreed. The court stated that "[the plaintiff] has not identified, and we have not found, any evidence in the record to indicate that the state judge who presided over her juvenile trial failed to hear (or was prevented from hearing) all of the relevant facts surrounding her interrogation before deciding to admit her confession into evidence." *Id.* at 294. Therefore, because the plaintiff's injury was caused by the trial judge's

erroneous failure to suppress her confession, the defendants were shielded from liability, notwithstanding their own wrongful conduct. *But cf. Malley*, 475 U.S. at 345 (holding that a police officer who applied for a warrant without probable cause could not evade liability under § 1983 for the unlawful arrest by arguing that it was the judge's issuance of the warrant that caused the plaintiff's injury, rather than the officer's conduct).

Here, there is no dispute that the Public Defender did not present the municipal judge with any information about Powers's financial status. Without the Public Defender stepping forward to alert the court to Powers's alleged indigency, the court had no way of knowing that indigency was an issue germane to its sentencing determination. True, the municipal judge had a duty to independently ascertain the relevant governing law, i.e., to know that he could not commit Powers to jail for non-payment of a fine if Powers was actually indigent. But the municipal judge did not have an independent duty to unearth facts establishing whether Powers was indeed indigent. Such a factual investigation was the responsibility of Powers's counsel. It was the Public Defender's duty to marshal the facts establishing Powers's indigency including, under Ohio law, Powers's income, assets, and debts, and bring them to the attention of the municipal court. O.R.C. § 2947.14. Having failed to do so, the Public Defender left the municipal judge with the misleading impression that Powers's financial circumstances did not need to be investigated prior to incarcerating him on the unpaid fine. We hold, therefore, that the municipal court's commitment order did not break the chain of causation. The Public

Defender may be held liable as the proximate cause of Powers's injury.

4. *The Public Defender Acted Under Color of State Law*

The Public Defender argues that it is not a state actor for purposes of § 1983 liability, *see Georgia v. McCollum*, 505 U.S. 42, 53 n.9, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (stating that the "state actor" and "acting under color of state law" inquiries are the same), because, under *Polk County v. Dodson*, 454 U.S. 312, 325, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981), public defenders do not "act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Reasoning that requesting indigency hearings is among these "traditional functions"–similar to "enter[ing] 'not guilty' pleas, mov[ing] to suppress State's evidence, object[ing] to evidence at trial, cross-examin[ing] State's witnesses, and mak[ing] closing arguments in behalf of defendants"–the Public Defender contends that it is immune to liability. *Polk County*, 454 U.S. at 320.

The Public Defender reads the holding of *Polk County* too broadly. The issue there was whether an individual attorney, employed by the county public-defender agency, acted under color of state law in her representation of the defendant. The Supreme Court rejected the argument that a public defender is a state actor merely because he or she is an employee of the state. *Id.* at 319-22. Moreover, the Supreme Court held that our adversarial system of justice and a lawyer's ethical duties to a client compel the conclusion that a

public defender is not an instrument of the state, but an independent agent of the client's interests. *Id.*

Significantly, the *Polk County* Court did not hold that a public defender never acts under color of state law. *See McCollum*, 505 U.S. at 54 ("the determination whether a public defender is a state actor for a particular purpose depends on the nature and context of the function he is performing"). Indeed, the Court articulated two propositions that are relevant here. First, the Court stated that "[i]t may be . . . that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions." *Polk County*, 454 U.S. at 325. Second, the Court noted that, in addition to his particular public defender, the plaintiff had named as defendants Polk County, the Polk County Offender Advocate (the equivalent of the Public Defender here), and the Polk County Board of Supervisors. *Id.* at 325-26. The Court held that although the plaintiff's pleading was insufficient to state a § 1983 claim for relief against the County defendants, it left open the possibility that the result might have been different had the plaintiff alleged the existence of an unconstitutional policy. *Id.* at 326.

The first question then is whether the Public Defender's purported policy of failing to seek indigency hearings on behalf of its clients falls within the "administrative" exception alluded to in *Polk County*. We conclude that it does.

Powers alleges that the Public Defender engages in an across-the-board policy or custom of doing nothing to protect its indigent clients' constitutional rights not

to be jailed as a result of their inability to pay court-ordered fines. Unlike the plaintiff in *Polk County*, Powers does not seek to recover on the basis of the failures of his individual counsel, but on the basis of an alleged agency-wide policy or custom of routinely ignoring the issue of indigency in the context of non-payment of fines. Although we acknowledge that requesting indigency hearings is within a lawyer's "traditional functions," the conduct complained of is nonetheless "administrative" in character for the reasons already described: Powers maintains that the Public Defender's inaction is systemic and therefore carries the imprimatur of administrative approval.

It is by no means clear that the Supreme Court intended to suggest a strict dichotomy between "administrative" practices of a public defender that may be deemed state action and "traditional functions" of a public defender, which may not. Stated differently, we do not read *Polk County* to mean that in using the term "administrative," the Supreme Court meant to limit a finding of state action only to managerial tasks, such as hiring, firing, and resource allocation, which are different in kind from the "traditional functions" of a lawyer representing a client. *See Polk County*, 454 U.S. at 325 (citing *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980) for the proposition that a public defender acts under color of state law when making hiring and firing decisions); *Miranda v. Clark County*, 319 F.3d 465 (9th Cir. 2003) (en banc) (holding that a public defender acted under color of state law in allocating resources to cases based on the results of polygraph tests routinely administered to clients). If that were the case, then a public-defender agency that adopted a policy, or acquiesced to a

custom, of refusing to cross-examine the State's witnesses would be immune to § 1983 liability–notwithstanding the obvious unconstitutionality of such a policy or custom–because cross-examining witnesses falls within the "traditional functions" of a lawyer.

Any doubt about whether the alleged policy or custom here constitutes state action is eliminated by the second consideration articulated in *Polk County*. As mentioned above, the Supreme Court did not decide whether the defendant in *Polk County* would have satisfied the state-action requirement if he had pleaded the existence of an unconstitutional policy. Here, Powers has done that very thing. He argues that the Public Defender systematically violates class members' constitutional rights by failing to represent them on the question of indigency. Given the reasoning of *Polk County*, it makes sense to treat this alleged policy or custom as state action for purposes of § 1983. The existence of such a policy, if proven, will show that the adversarial relationship between the State and the Public Defender–upon which the *Polk County* Court relied heavily in determining that the individual public defender there was not a state actor–has broken down such that the Public Defender is serving the State's interest in exacting punishment, rather than the interests of its clients, or society's interest in fair judicial proceedings.

For these reasons, we hold that Powers satisfies the state-action requirement.

5. *The Record Reveals a Genuine Issue of Material Fact Regarding the Existence of the Alleged Policy or Custom*

In its order denying summary judgment for the Public Defender, the district court stated that "it is clear to the Court that the Public Defender Commission and the Hamilton County Public Defender had a well-settled custom or policy of not asking for an indigency hearing before a probationer is incarcerated for failure to pay a fine." (Class Cert./Summary Judgment Order at 13-14.) In ruling on Powers's motion for summary judgment, the district court stood by its earlier conclusion, commenting: "Defendants have failed to raise a genuine issue of material fact as to the existence of such a policy . . . There is no question in the Court's view that indigent defendants represented by the Hamilton County Public Defender were jailed on fines that they were unable to pay."[2] (Order on Powers's Motion for Summary Judgment at 19.)

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[2] Powers argues that the Public Defender has waived any argument about whether Powers is entitled to summary judgment as to the existence of the alleged policy or custom because the Public Defender failed to sufficiently develop this argument in its appellate briefing. We disagree. Although the Public Defender does not explain what inferences should be drawn in its favor as the non-moving party, it does adequately point to the record evidence tending to show, in its view, that there is no policy or custom of violating the constitutional rights of its clients by failing to seek indigency hearings, or that, at a minimum, there is a genuine issue of material fact as to its existence.

To establish the existence of the alleged policy or custom, Powers presented several different types of evidence, including the record of the proceedings in his own case, affidavit testimony about what the "judges' sheets" in numerous cases show, seven transcripts of court proceedings, and an excerpt from judicial meeting minutes.[3] Each of these will be discussed in turn.

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[3] None of Powers's evidence satisfies the standards of Federal Rule of Civil Procedure 56 for evidence submitted in support of summary judgment. Rule 56(e) provides as follows: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Neither the hearing transcripts, nor the excerpt from the judicial meeting minutes are attached to an affidavit explaining how they were obtained, from where, or by whom. Similarly, Weber's affidavit (discussed *infra* does not show that he "is competent to testify to the matters" he describes because he does not identify himself, explain his professional background or skills, or in what capacity he was serving when he undertook to research the court records he describes. Despite these glaring deficiencies, we may still consider Powers's evidence because the Public Defender did not object to its competence below (or on appeal, for that matter). *See Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994) ("If a party fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived, and we will review such objections only to avoid a gross miscarriage of justice."); *Carter v. Western Reserve Psychiatric Habilitation Ctr.*, 767 F.2d 270, 273 n.2 (6th Cir. 1985) (per curiam) ("Although the district court may have erred in basing its holding . . . on unsworn affidavits and uncertified copies of documents attached as exhibits to appellees' motion for summary judgment, since such materials

First, the record in Powers's own case does not reflect that his counsel asked for a hearing into his ability to pay the court-ordered fine and costs, either at the entry of his no-contest plea to the underlying reckless-driving charge, or at the hearing on his probation violation for failing to pay the fine and costs. (JA 129-32.) Indeed, at Powers's probation hearing, the judge recited Powers's purported probation violations, including the non-payment of the fine and court costs and asked Powers's counsel if he had anything to say on behalf of his client. Powers's counsel responded, "[n]othing, Judge." (JA 130.)

Second, Powers submitted the affidavit testimony of John Weber, who avers that he researched the cases of persons incarcerated for non-payment of fines by reviewing the records in their proceedings through the Hamilton County Clerk of Courts office. Weber based his research on a list of persons who were jailed between August 21, 2000, and August 21, 2002, for failure to pay fines. The list was compiled at the direction of the Hamilton County Prosecutor and produced to Powers in discovery. The list is twenty-three pages long and Powers says it consists of approximately 1000 names.

Weber avers that he researched names on only the first four pages of the list. Weber obtained the "judges' sheets" in some unspecified number of cases. These judges' sheets, according to Weber, "contain the entries made by the judges" disposing of the matters before

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do not comport with the requirements of Fed. R. Civ. P. 56(e), we are satisfied that essential justice was done.").

them. (JA 142-43.) Weber testified that in thirty-two cases, the judges' sheets simply ordered the defendants' "commit[ed] on fines" and in no case reflected any findings of fact into the offender's income, assets, debts, and ability to pay the fine, as required by O.R.C. § 2947.14. (JA 143.)

Powers submitted the judges' sheets from four cases, which were presumably retrieved by Weber pursuant to his research. None of these judges' sheets reflect an inquiry into the offenders' ability to pay the court-imposed fine.

Third, Powers presented seven transcripts of hearings in which the court ordered the defendants to pay a fine for their infractions, or ordered them jailed for their failure to pay. In no case do the transcripts show that the defendants' counsel objected to the imposition of a fine on indigency grounds or asked for an inquiry into their clients' ability to pay. One transcript shows that the defendant's counsel asked the court to commit his client because the client "[c]an't afford to pay." (JA 148-49.)

The last piece of evidence Powers submitted was an excerpt from what appear to be meeting minutes from 1982, in which Judge Timothy Hogan, who chaired the Standing Criminal Committee at that time, reported on his committee's efforts to protect against the jailing of indigent persons for non-payment of fines:

> Judge Hogan informed the Judges assembled of a letter from Robert Newman, Legal Aid Director, challenging the incarceration of defendants for fines if they are indigent. He

> reported that Judge Albanese had chaired a special committee which met on June 23rd and the committee instructed the Court Administrator, Mr. Schweiker, to draft a procedure to eliminate the problem.

(JA 74.)

As described above, the district court concluded that this evidence was sufficient to unequivocally establish that the Public Defender has a policy or custom of failing to seek indigency hearings on behalf of its clients threatened with incarceration for non-payment of fines.

We disagree with the district court and instead conclude that Powers's evidence is insufficient to show a "clear and persistent pattern" of abuse that the Defendants knew about and acquiesced in sufficient to entitle Powers to summary judgment as a matter of law. *Doe*, 103 F.3d at 508; *but see Alkire*, 330 F.3d at 818 (plaintiff's evidence showing that no ability-to-pay determination was made in his case or in nine other cases was sufficient to *defeat* summary judgment). In particular, it is difficult to assess the probative value of what would seem to be Powers's strongest piece of evidence, namely, Weber's testimony, because Weber's affidavit is inartfully drawn. By our count, there are 174 names of incarcerated individuals on the four pages of the list that Weber consulted. Weber testifies that in thirty-two cases, the judges' sheets suggest that no inquiry into the offenders' ability to pay was conducted. However, Weber does not state that if indigency hearings were requested or held, the judges' sheets would be the court record, as opposed to some

other document, that noted this fact. Moreover, Weber does not state (1) whether he researched the records in the cases of all 174 persons listed and indigency hearings were not held in only thirty-two, giving rise to the inference that they occurred in the remaining 142 cases; (2) whether he simply randomly selected thirty-two of the 174 names; or (3) whether he could obtain information on only thirty-two cases because the court records in the other cases were not available. In short, without a context as to why Weber's findings were limited to thirty-two cases, we cannot conclude that his testimony confirms the existence of the Public Defender's alleged policy or custom.

Although it is clear that Powers has not satisfied his summary judgment burden, the Public Defender does not controvert any of Powers's evidence, except for the seven hearing transcripts Powers submitted. The Public Defender does not dispute that Powers never received an indigency hearing, nor does the Public Defender challenge Weber's testimony that the court records in thirty-two cases between 2000 and 2002 did not reflect any inquiry into the offenders' ability to pay court-ordered fines before they were incarcerated for non-payment. As to the seven hearing transcripts, the Public Defender argues that two of the defendants there were not represented by the Public Defender, that one defendant's fine was obviated by jail time already served, and that three other defendants' indigence was reported to the court.

Although it generally does not attack Powers's evidence, the Public Defender adduced evidence of its own, which it claims shows that the purported policy does not exist or, at a minimum, gives rise to a

genuine issue of fact as to its existence. The Public Defender's evidence consists of affidavit testimony from the current Hamilton County Public Defender and head of the Public Defender's office, Lou Stringari, and identical, form affidavits from fourteen Public Defender staff attorneys. Taken together, this evidence stands for the proposition that assistant public defenders comply with their professional obligations to advocate on behalf of their clients' best interests and that they take into account a myriad of factors in assessing how best to represent a client facing a monetary penalty. Finally, the Defendants submitted an affidavit from Mary W. Sullivan, the Chairperson of the Public Defender Commission, in which she avers that the Commission does little more than oversee the budgetary needs of the Public Defender's office.

First, Stringari testifies that he has served as the Hamilton County Public Defender since 1994. He explains that the Office of the Public Defender employs staff attorneys as assistant public defenders and also contracts with private-sector attorneys "on an on-call basis." (JA 331.) He further testifies that,

> The office of the County Public Defender does not direct or control the actions of either its staff attorneys or the attorneys operating on a contract basis in the municipal division [i.e., the division that represents perons charged with misdemeanors in municipal court] with respect to tactical decisions made in the representation of individual clients. The office expects that each attorney working for it will represent their clients in a professional manner and exercise independent judgment in the best interest of the

> represented clients consistent with standards established by the Supreme Court of Ohio in its Code of Professional Responsibility.

(JA 332.)

The affidavits submitted by the fourteen assistant public defenders are identical in substance. All of these attorneys aver that "[w]hen making decisions regarding the representation of an individual client, I am governed by the best interests of my client and my oath as a lawyer." (JA 338-379.) They further testify, verbatim, as to the nature of their representation when their clients are facing fines:

> When a monetary fine is a component of a sentence the discussion of how to proceed includes:
>
> the ability of the client or someone else to pay the fine and reasons for prior non-payment;
> whether they are being held on other charges;
> if the jail is at capacity, a commitment on a fine may result in an immediate release;
> resolution of the fine may result in early termination of probation;
> if credited with time served, an immediate release may result;
> the possibility of a commitment concurrent with a jail sentence associated with the same or a different offense.

(JA 378-79.)

Importantly, neither Stringari, nor the individual staff attorneys, testify that they request indigency hearings where appropriate, including to fend-off possible incarceration for non-payment of fines. In addition, although the staff attorneys aver that they take into account certain tactical considerations when their clients are facing monetary penalties, they do not explain if, or how, these considerations affect their analysis of whether to ask for an indigency hearing. Finally, the Public Defender did not submit any court records showing that it has sought indigency hearings in order to counter the court records submitted by Powers showing that it has not.

As described above, we conclude that Powers has not submitted sufficient evidence entitling him to summary judgment. Even if his evidence were sufficient, however, we would still reverse the district court's judgment on the grounds that the Public Defender has raised a genuine issue of material fact at to the existence of the purported policy or custom of failing to seek indigency hearings. Drawing all reasonable inferences in favor of the Public Defender, the Stringari affidavit and those of the staff attorneys could be read as averring that in some circumstances, the best interests of the client are served by not seeking an inquiry into his/her ability to pay a court-ordered fine. For instance, a public defender may counsel her client to accept a commitment on a fine because the public defender knows that the jail is full and her client therefore will not actually serve any time. (JA 378 ("if the jail is at capacity, a commitment on a fine may result in an immediate release").) Similarly, if jail time on a fine can be served concurrent with another sentence, then challenging

the fine on indigency grounds may only expose the client to an alternative and additional penalty, such as community service. (JA 378-79 ("the possibility of a commitment concurrent with a jail sentence associated with the same or a different offense").) The same analysis may apply if the client is "being held on other charges." (JA 378.) Thus, strictly speaking, defendants may sustain a deprivation of their constitutional rights but, in some proportion of cases, that deprivation may be immaterial because not asking for an indigency hearing, and simply accepting a commitment for non-payment of a fine, may be more beneficial to the client than requesting the hearing. Given the tension here between the constitutional rights at stake and a lawyer's ethical duty to represent her client's best interests, further factual development in the district court is needed.

Accordingly, we reverse the district court's grant of summary judgment for Powers and remand for further proceedings.

E. The District Court did not Err in Certifying a Class

The district court granted Powers's motion for class certification, concluding that the requirements spelled out in Federal Rule of Civil Procedure 23 have been satisfied. We review a class-certification determination for an abuse of discretion. *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1213 n.9 (6th Cir. 1997). "A district court that either uses the wrong legal standard or misapplies the correct legal standard abuses its discretion." *Id.* For the reasons described below, we affirm the district court's grant of class certification

but modify the class definition to exclude persons who were not represented by the Public Defender.

A class action cannot be certified unless the numerosity, commonality, typicality, and adequacy requirements of Rule 23 are met. In other words, the plaintiff must show that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the class representative are typical of the claims or defenses of the class, and (4) the representative party will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). In addition, the plaintiff must satisfy one of the subsections of Rule 23(b). Here Powers moved for certification under Rule 23(b)(3), which demands a showing that questions of law or fact common to the class predominate over questions affecting only individual class members.

The district court certified a class consisting of:

> [a]ll persons who, without an indigency hearing, were committed to the custody of a Hamilton County correctional facility by a Hamilton County municipal or common pleas court from August 21, 2000, to the present in satisfaction of a fine and/or court costs, including persons who violated probation following a 'stay to pay' sentence.

(Final Judgment Order at 1.)

On appeal, the Public Defender argues that the district court erred in certifying the class because

Powers has failed to satisfy Rule 23(a)'s commonality and typicality requirements and has further failed to satisfy Rule 23(b)(3)'s predominance requirement.

As an initial matter, we conclude that, as presently defined, the class is overbroad because it is not limited to persons who were represented by the Public Defender, but instead encompasses "[a]ll persons who, without an indigency hearing, were committed to the custody of a Hamilton County correctional facility . . . ." The Public Defender cannot be held liable for harm to persons that it did not cause. Therefore, we will modify the class definition to exclude persons who proceeded *pro se* or who were represented by attorneys other than public defenders. *See Barney*, 110 F.3d at 1214-15 (modifying the class definition on appeal to conform to the parties' arguments); *In re Chiang*, 385 F.3d 256, 268-69, 272, 46 V.I. 679 (3d Cir. 2004) (modifying the class definition on appeal to reflect the plaintiffs' focus on national-origin discrimination and to eliminate an improper subjective element of the class definition). Accordingly, the class will now be defined as:

> [a]ll persons who were represented by the Office of the Hamilton County Public Defender, and who, without an indigency hearing, were committed to the custody of a Hamilton County correctional facility by a Hamilton County municipal or common pleas court from August 21, 2000, to the present in satisfaction of a fine and/or court costs, including persons who violated probation following a 'stay to pay' sentence.

With this revised class definition in mind, we proceed to consider the Public Defender's arguments challenging class certification.

First, the Public Defender contends, without any explanation, that Powers is not typical of the class he seeks to represent. To satisfy the typicality requirement, the representative plaintiff's interests must be aligned with those of the class. *Sprague v. GMC*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc) (citing Herbert B. Newberg & Alba Conte, Newberg on Class Actions, § 3-13, at 3-75, 76 (3d ed. 1992)). "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996).

The Public Defender does not dispute that Powers was committed to jail for failing to pay a court-ordered fine and that his counsel did not seek an indigency hearing at any time prior to his incarceration. The Public Defender also does not dispute that the class certified by the district court consists of similarly situated persons who were incarcerated for their non-payment of fines in the absence of an inquiry into their ability to pay those fines. It therefore cannot be said that Powers is not typical of the class he seeks to represent.

Second, the Public Defender argues that neither the commonality, nor the predominance requirements are satisfied because there are too many variations in the experiences of individual class members to make class treatment of their claims appropriate. Notably,

the Public Defender does not explain what these purported "variations" are.

The commonality requirement is satisfied if there is a single factual or legal question common to the entire class. *Am. Med. Sys.*, 75 F.3d at 1080. The predominance requirement is met if this common question is at the heart of the litigation. "[T]he mere fact that questions peculiar to each individual member of the class action remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988). Cases alleging a single course of wrongful conduct are particularly well-suited to class certification. *Id.* Here, Powers has alleged that the Public Defender engaged in an ongoing and regular practice of failing to seek indigency hearings for criminal defendants facing incarceration for non-payment of fines. Powers has asserted a single factual theory of wrongdoing and seeks to recover based on the single legal claim that the Public Defender's practice violated class members' due process rights. The dispositive facts and law are the same as to each class member. This is sufficient to satisfy both the commonality and predominance requirements.

Finally, the Public Defender appears to criticize the district court's repeated modification of the class definition but does not go so far as to contend that this amounted to reversible error, nor could it. As demonstrated by our own clarifying revision to the class definition, courts must be vigilant to ensure that a certified class is properly constituted. More to the point, district courts have broad discretion to modify

class definitions, so the district court's multiple amendments merely showed that the court took seriously its obligation to make appropriate adjustments to the class definition as the litigation progressed. *See, e.g. Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005) (noting that "[l]itigants and judges regularly modify class definitions"); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004) ("District courts are permitted to limit or modify class definitions to provide the necessary precision.").

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's conclusion that Powers's § 1983 claims are cognizable and also **AFFIRM** the grant of class certification. We **REVERSE** the district court's judgment that Powers is entitled to summary judgment as a matter of law, and **REMAND** for further proceedings consistent with this opinion.

DISSENT

ALAN E. NORRIS, Circuit Judge, dissenting. While I agree with much of the majority's opinion, we part company on what it properly recognizes to be the "thorny question" of causation, specifically proximate cause. Maj. Op. at 12. The Ohio Revised Code places the duty squarely upon the court to hold a hearing into a defendant's financial resources before committing him to a jail or workhouse for failure to pay a fine.

Ohio Rev. Code § 2947.14.[1] In a perfect world, defense counsel should remind the court of its statutory obligation, particularly when it is in the best interest of his or her client.[2] However, simply because judges face lengthy and growing dockets does not excuse them from fulfilling a statutory duty, as the majority suggests. Nor may a court refrain from inquiring into an issue that has not been raised by the litigants when a statute commands it. This court, for instance, has an independent duty to examine the basis of its jurisdiction regardless of whether the parties have briefed the issue. Accordingly, it seems to me that the majority is in error when it concludes that the trial court's breach of its duty does not sever the "chain of

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[1] This statute, which addresses the requirements outlined in *Bearden v. Georgia*, 461 U.S. 660, 667, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), provides in part as follows:

> If a fine is imposed as a sentence or a part of a sentence, the court or magistrate that imposed the fine may order that the offender be committed to the jail or workhouse until the fine is paid or secured to be paid, or the offender is otherwise legally discharged, if *the court or magistrate* determines at a hearing that the offender is able, at that time, to pay the fine but refuses to do so. The hearing required by this section shall be conducted at the time of sentencing.

Ohio Rev. Code § 2947.14(A) (emphasis added).

[2] As the majority notes, there may be scenarios where requesting a hearing is not in the best interest of the client, Maj. Op. at 39, which may help to explain why the statutory scheme places the duty to inquire on the court.

causation" between plaintiff's injury and defendant's alleged wrongdoing. Maj. Op. at 13.

In cases of outright misrepresentation by defense counsel, I agree with the majority that an erroneous ruling on the part of the court would not serve as a superseding cause. That is not the case here, however. The majority states that "there is no dispute that the Public Defender did not present the municipal judge with any information about Power's financial status." Maj. Op. at 14. On the contrary, counsel informed the court that "Mr. Powers is homeless and can't come up with any bond," which put the court on notice that an indigency hearing was necessary if the court intended to confine Powers for nonpayment of his fine.[3] It is hard for me to fathom how counsel's statement, as the majority would have it, "left the municipal judge with the misleading impression that Power's financial circumstances did not need to be investigated prior to incarcerating him on the unpaid fine." Maj. Op. at 14. In short, I find nothing in this record to support the majority's conclusion that the Public Defender, not the court, proximately caused Power's alleged constitutional injury.

I respectfully dissent.

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[3] The fact that Powers was represented by the Public Defender in the first place likewise provided a clear signal to the court that his financial resources were limited.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 1:02cv605

[Filed March 23, 2006]

MICHAEL POWERS	)
	)
Plaintiff,	)
	)
-vs-	)
	)
HAMILTON COUNTY PUBLIC DEFENDER COMMISSION, *et al.*	)
	)
Defendants.	)
	)

FINAL JUDGMENT

Having reviewed the written arguments of the parties and, having conducted a hearing on the issue of class damages and on the issue of the proper determination of class membership, IT IS HEREBY ORDERED:

1) The class definition is hereby modified to read:

All persons who, without an indigency hearing, were committed to the custody of a Hamilton County correctional facility by a Hamilton County municipal or common pleas court from August 21, 2000, to the present in satisfaction of a fine and/or court costs, including persons who violated probation following a "stay to pay" sentence.

2) A list of Class Members is contained in the Stipulated Joint Exhibit (doc. 58), filed on March 22, 2006.

3) The County shall, at its expense, provide notice to the Class by sending a notice and proof of claim in substantially the same form as Exhibit A hereto to the last known address of each Class Member. Said class notice and proof of claim is hereby approved in form and content;

4) The County shall also, at its expense, cause an advertisement to be placed in the Cincinnati Enquirer in substantially the same form as Exhibit B hereto, which shall be in the same size type as that used in news articles.

5) Those Class Members who filed a timely proof of claims shall become part of the Participating Class. The County shall compensate all Participating Class Members in the amount of $100 for every day they were wrongfully incarcerated. The number of days of wrongful incarceration for a given Participating Class Member shall be calculated by dividing the fine ascribed to that person in the Stipulated Joint Exhibit (doc. 58) and dividing that fine by $30, the statutory

rate of satisfaction of fines then in effect. A fraction of a day shall be considered a full day of incarceration. Said payment shall be made within 30 days of the submission of the proof of claim.

6) Class Counsel may file a petition for an award of fees and costs within 15 days of this judgment.

7) Costs shall be taxed to the County.

8) Defendants have indicated that they intend to appeal this judgment, and its execution is hereby stayed for the duration of any such appeal.

SO ORDERED.

Dated: 3/23/06

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge

Presented By:

/s/ Stephen R. Felson
Stephen R. Felson
Attorney for Plaintiff

Have seen:

/s/ David T. Stevenson by S.R. Felson
David T. Stevenson
Attorney for Defendants
Per telephone authorization 3/23/06

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:02cv605

[Dated March 23, 2006]

MICHAEL POWERS	)
	)
Plaintiff,	)
	)
v.	)
	)
HAMILTON COUNTY PUBLIC DEFENDER COMMISSION, *et al.*	)
	)
Defendants.	)
	)

NOTICE OF CLASS ACTION

TO:

ALL PERSONS WHO, WITHOUT AN INDIGENCY HEARING, WERE INCARCERATED IN A HAMILTON COUNTY CORRECTIONAL FACILITY BY A HAMILTON COUNTY MUNICIPAL OR COMMON PLEAS COURT AT ANY TIME FROM AUGUST 21, 2000, TO THE PRESENT AS A RESULT OF THE NON-PAYMENT OF A FINE AND/OR NON-

PAYMENT OF COSTS, INCLUDING PERSONS WHO VIOLATED PROBATION FOLLOWING A "STAY TO PAY" SENTENCE.

Pursuant to an Order of the United States District Court for the Southern District of Ohio, and in accordance with Rule 23(e) of the Federal Rules of Civil Procedure, you are hereby notified of the certification of a class action of which you are a member. The case name and number are set forth at the top of this page.

BACKGROUND

You are being provided this notice because records of Hamilton County, Ohio, indicate that you were ordered incarcerated by a Hamilton County municipal or common please court for non-payment of fines and/or costs without the required hearing to determine whether you could in fact pay those fines or costs.

PARTIES AND CERTIFICATION

Mike Powers brought this action against the Hamilton County Public Defender Commission and other County defendants on January 7, 2002, seeking compensation for himself and all persons similarly situated for time spent in jail for the non-payment of an obligation to the County which they could not pay. By Order of the Court entered February 7, 2006, the United States District Court for the Southern District of Ohio, Western Division, certified a class action on behalf of all such persons. In a subsequent order the Court decided that each Class Member who files a

timely Proof of Claim will receive $100 for each night spent in jail during the relevant time period, a night being defined as any period of time which includes midnight.

PROOF OF CLAIM REQUIRED

If you do not exclude yourself from the Class, you will be bound by the judgment of the Court and will not be able to sue again. However, you will only receive the funds due to you if you establish your right to those funds by completing and mailing the attached Proof of Claim on or before _____.

EXCLUSION FROM THE CLASS

If you wish to be excluded from the Class you must indicate that desire on the Proof of Claim and send it by first-class mail, postmarked on or before ____, 2006, addressed as follows:

Stephen R. Felson, Esq.
617 Vine Street, Suite 1401
Cincinnati, OH 45202

ATTORNEY FEES AND EXPENSES

Counsel for the Class will make an application to the Court for an award of fees and expenses as compensation for their services. Any award of fees and expenses approved by the Court shall be paid by Defendants and shall not be deducted from any amount due to you.

FURTHER INFORMATION AVAILABLE

This Notice is not intended to be, and should not be construed as, a complete picture of this case. Any questions you may have about the matters addressed by this Notice should not be made to the Court but should instead be directed to the Counsel for the Class by writing to the following address:

Stephen R. Felson, Esq.
617 Vine St., Suite 1401
Cincinnati, OH 45202

Certain of the pleadings and other papers filed in this action are also available for inspection at the office of the Clerk of the Court in the U.S. Courthouse, 100 E. Fifth Street, Cincinnati, OH, 45202.

By Order of The Honorable S. Arthur Spiegel, Judge of the United States District Court for the Southern District of Ohio

PROOF OF CLAIM FORM

Powers v. Hamilton County Public Defender Comm'n, et al.
Case No. 1:02cv605

«fname» «lname»
«Address»
«City», «State» «Zip»

JMS # «JMSno»

YOUR CURRENT ADDRESS: (must be complete)
Street: _____
City/State: _____
ZIP: _____

APPROXIMATE DATE OR DATES YOU SPENT IN A HAMILTON COUNTY DETENTION FACILITY AFTER HAVING BEEN SENTENCED BY A HAMILTON COUNTY MUNCICIPAL OR COMMON PLEAS COURT TO JAIL FOR NON-PAYMENT OF FINES AND/OR COSTS WITHOUT AN INDIGENCY HEARING.

_____

Return this completed form on or before _____, 2006, by mailing it to the following address:

Stephen R. Felson, Esq.
617 Vine Street, Suite 1401
Cincinnati, Ohio 45202

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 1:02cv605

[Dated March 23, 2006]

MICHAEL POWERS	)
	)
Plaintiff,	)
	)
-vs-	)
	)
HAMILTON COUNTY PUBLIC DEFENDER COMMISSION, et al.	)
	)
Defendants.	)
	)

SUMMARY NOTICE OF CLASS ACTION JUDGMENT

TO:

ALL PERSONS WHO, WITHOUT AN INDIGENCY HEARING, WERE COMMITTED TO THE CUSTODY OF A HAMILTON COUNTY CORRECTIONAL FACILITY BY A HAMILTON COUNTY MUNICIPAL OR COMMON PLEAS COURT FROM AUGUST 21, 2000, TO THE PRESENT IN SATISFACTION OF A FINE

AND/OR COURT COSTS, INCLUDING PERSONS WHO VIOLATED PROBATION FOLLOWING A "STAY TO PAY" SENTENCE.

Please read this notice carefully. It affects your rights.

THE NATURE OF THIS LAWSUIT

You are hereby notified of the final judgment in favor of the class of persons set forth above. If you are a member of that class you are eligible to receive one hundred dollars per day of wrongful incarceration.

FURTHER INFORMATION AVAILABLE

The description in this notice is general only and does not purport to provide a complete statement of the rights of class members. Any questions you may have about the matters asserted in this Notice should not be made to the Court but should instead be directed to Class Counsel, Stephen R. Felson, Suite 1401, 617 Vine Street, Cincinnati, Ohio 45202. Pleadings and other papers filed in this action are available for inspection at the office of the Clerk of Court, U.S. Courthouse, 100 East Fifth Street, Cincinnati, Ohio 45202.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO. 1:02-CV-00605

[Filed February 7, 2006]

MICHAEL POWERS,	)
	)
Plaintiff,	)
	)
v.	)
	)
HAMILTON COUNTY PUBLIC DEFENDER COMMISSION, *et al.*,	)
	)
Defendants.	)
	)

OPINION AND ORDER

This matter is before the Court on Plaintiff's Individual and Class Motion for Partial Summary Judgment on Liability (doc. 36), Defendants' Response (doc. 42), and Plaintiff's Reply (doc. 44). Also before the Court is Plaintiff's Individual and Class Motion for Partial Summary Judgment on Damages (doc. 39), Defendants' Response (doc. 42), and Plaintiff's Reply (doc. 49).

I. Background

This matter involves Plaintiff's allegations that in violation of constitutional and statutory rights, Defendants systematically failed to provide him and class members with representation on the issue of their ability to pay fines and/or costs assessed by Hamilton County Municipal Court, resulting in their incarceration despite their inability to pay those fines/costs (doc. 1).[1] On August 25, 2005, the Court certified Plaintiff's proposed class to include:

> All persons who, without an indigency hearing, have been incarcerated in a Hamilton County correctional facility from August 21, 2000 to present, as a result of the nonpayment of a fine and or costs, including persons who violated probation following a "stay to pay sentence."

(doc. 36). In the same Order, the Court rejected Defendants Hamilton County Public Defender (hereinafter, "Public Defender") and the Hamilton County Public Defender Commission's (hereinafter, "Commission") motion for summary judgment challenging Plaintiff's Section 1983 claims (*Id.*). The Court concluded that "the administration of an unconstitutional policy by a public defender agency can be actionable under Section 1983" (*Id.*). Plaintiff brings his current motions for summary judgment arguing that the Court's rejection of Defendants' motion clearly establishes liability in his favor and in

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[1] The Court incorporates by reference the factual background and procedural history of its August 25, 2005 Order (doc. 34).

favor of the class (doc. 36). Accordingly, Plaintiff requests the Court to enter an Order in favor of the class, and at the statutory amount fixed in Ohio's wrongful imprisonment statute, $118.71 per day (doc. 39, *citing* Ohio Rev. Code § 2743.48(E)(2)(b)).

Defendants argue in response that taking all inferences in favor of the nonmoving party, summary judgment against them is inappropriate (doc. 42). Defendants attempt to reframe the case so as to focus on the actions of individual attorneys representing clients, rather than on the established general practice of failure to request indigency hearings (*Id.*). In so doing, Defendants reiterate and reincorporate the same arguments they raised in support of their motion for summary judgment (*Id.*). Defendants further argue that if this matter is solely about procedure and not about Plaintiff's underlying sentence, then his claim is frivolous and ought to be dismissed, as "there is no liberty interest in process itself" (*Id.*). As for Plaintiff's claim for damages, Defendants argue that Ohio's waiver of immunity for damages for wrongful imprisonment does not apply to misdemeanor offenders, and Ohio's Court of Claims has exclusive original jurisdiction over such claims (*Id. citing* Ohio Rev. Code § 2743.48(A) and § 2743.48(D)).

Plaintiff replies that the Court decided several of the issues raised by Defendants in its prior Order, that inferences in favor of Defendants cannot preclude judgment in favor of Plaintiff, and that the Public Defender cannot claim he has no control over his employees or the litigation policy they pursue (doc. 44). The bottom line according to Plaintiff is that the Constitution and Ohio law forbid the incarceration of

a citizen for a debt unless he or she has been granted a hearing to establish whether he or she could pay or was in fact indigent (*Id.*). Accordingly, Plaintiff argues, every citizen has a liberty interest in not being incarcerated for debt without a hearing (*Id.*).

II. PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

A. Applicable Legal Standard

Although a grant of summary judgment is not a substitute for trial, it is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; *see also, e.g., Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992) (per curiam). In reviewing the instant motion, "this Court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993), *quoting in part Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (internal quotation marks omitted).

The process of moving for and evaluating a motion for summary judgment and the respective burdens it

imposes upon the movant and the non-movant are well settled. First, "a party seeking summary judgment . . . bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also LaPointe*, 8 F.3d at 378; *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir. 1992); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). The movant may do so by merely identifying that the non-moving party lacks evidence to support an essential element of its case. *See Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1389 (6th Cir. 1993).

Faced with such a motion, the non-movant, after completion of sufficient discovery, must submit evidence in support of any material element of a claim or defense at issue in the motion on which it would bear the burden of proof at trial, even if the moving party has not submitted evidence to negate the existence of that material fact. *See Celotex*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As the "requirement [of the Rule] is that there be no genuine issue of *material* fact," an "alleged factual dispute between the parties" as to some ancillary matter "will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48 (emphasis added); *see generally Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989). Furthermore, "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably

find for the [non-movant]." *Anderson*, 477 U.S. at 252; *see also Gregory v. Hunt*, 24 F.3d 781, 784 (6th Cir. 1994). Accordingly, the non-movant must present "significant probative evidence" demonstrating that "there is [more than] some metaphysical doubt as to the material facts" to survive summary judgment and proceed to trial on the merits. *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993); *see also Celotex*, 477 U.S. at 324; *Guarino*, 980 F.2d at 405.

Although the non-movant need not cite specific page numbers of the record in support of its claims or defenses, "the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party relies." *Guarino*, 980 F.2d at 405, *quoting Inter-Royal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989) (internal quotation marks omitted). In contrast, mere conclusory allegations are patently insufficient to defeat a motion for summary judgment. *See McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990). The Court must view all submitted evidence, facts, and reasonable inferences in a light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). Furthermore, the district court may not weigh evidence or assess the credibility of witnesses in deciding the motion. *See Adams v. Metiva*, 31 F.3d 375, 378 (6th Cir. 1994).

Ultimately, the movant bears the burden of demonstrating that no material facts are in dispute. *See Matsushita*, 475 U.S. at 587. The fact that the non-

moving party fails to respond to the motion does not lessen the burden on either the moving party or the Court to demonstrate that summary judgment is appropriate. *See Guarino*, 980 F.2d at 410; *Carver v. Bunch*, 946 F.2d 451, 454-55 (6th Cir. 1991).

B. Discussion

1. Plaintiff's Motions (docs. 36 & 39)

Plaintiff argues that he has satisfied the elements of a Section 1983 claim, which is comprised of proof of (1) deprivation of a right secured by the Constitution or laws of the United States, and (2) deprivation caused by a person while acting under color of state law (doc. 36, *citing Christy v. Randlett*, 932 F.2d 502, 504 (6th Cir. 1991)). Additionally, under *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364 (6th Cir. 1994), when the claim is based on a policy, plaintiff must identify the policy, connect the policy to the defendant, and show that his injury resulted because of execution of the policy (*Id.*). Plaintiff argues these elements are satisfied because the right not to be incarcerated for debt is a federal right which may be redressed by a Section 1983 action, and persons accused of probation violations possess a federal right to counsel to preserve that right (*Id. citing Bearden v. Georgia*, 461 U.S. 660 (1983), *Alkire v. Irving*, 330 F.3d 802, 816 (6th Cir. 2003)). Plaintiff argues the Court has already found that Defendants had a well-settled policy of not asking for an indigency hearing before a defendant is incarcerated for failure to pay a fine, and the causal connection between Defendants' conduct and Plaintiff's time in jail is too clear to require a trial (*Id.*). Finally, Plaintiff argues there is no difference between him and

the class for purposes of summary judgment, and he cites to the transcripts filed with the court showing a number of defendants committed on fines with no request for an indigency hearing made (*Id.*).

Plaintiff's parallel motion on damages argues that his discovery requests should produce sufficient information as to how many days each class member was imprisoned on fines (doc. 39). Plaintiff argues that the amount of liquidated damages in Ohio's wrongful imprisonment statute, Ohio Rev. Code § 2743.48(E)(2)(b), which is $118.71 per day, should be a fair amount for the Court to award to each class member per day of imprisonment (*Id.*).

2. Defendants' Response (doc. 42)

Defendants' Consolidated Response to Plaintiff's Motion first recounts the organization and duties of the Hamilton County Public Defender Commission and the County Public Defender (doc. 42). Defendants argue the Commission's responsibilities do not include day-to-day supervision of the office of the Public Defender, that management decisions are made by the Public Defender, and the Commission plays no role in employment decisions regarding attorneys working for the Public Defender (*Id.*). Under statute, explain Defendants, the Commission's responsibilities include the appointment of the county public defender and a recommendation to the County Commissioners for the annual operating budget (*Id.*). The members of the Commission are volunteers who serve without pay and the Commission has no operating revenue, no budget, and incurs no expenses (*Id.*).

Defendants next explain that all attorneys hired by the Public Defender are licensed in the State of Ohio (*Id.*). Defendants indicate that its staff and contract attorneys are not directed or controlled by the Public Defender with respect to tactical decisions made in the representation of individual clients (*Id.*). Defendants proffer numerous attorney affidavits outlining the responsibilities of staff attorneys employed by the Public Defender, and stating that when a fine is a component of a sentence, there are numerous considerations made (*Id.*). Defendants argue the sentencing transcripts provided by Plaintiff include two defendants not represented by the Public Defender, one defendant who was given credit for time served to cover the fine imposed, and four others, the indigency status of whom was reported to the court (*Id.*).

Defendants reiterate their argument that Plaintiff is questioning the validity of his sentence, which cannot be done under *Heck v. Humphrey*, 512 U.S. 477 (1994) (doc. 42). Defendants further repeat their argument that Plaintiff's claim relates entirely to the representation he received by an individual attorney, and no Section 1983 action can stand in such an instance under *Polk County v. Dodson*, 454 U.S. 312 (1981) (*Id.*). Defendants state this case boils down to the simple proposition of whether *Heck* and *Polk* are still controlling law in this circuit, or not (*Id.*). Defendants next argue that all reasonable inferences must be made in their favor, such that it is "irrelevant" whether Plaintiff has satisfied all the elements of a Section 1983 claim (*Id.*). Defendants argue that the Public Defender does not control the decisions made by assigned counsel, so there is no policy and no liability

attaches to the Public Defender (*Id.*). As for the Public Defender Commission, Defendants argue its limited role focuses on staffing and budgetary needs and it has no role in the managerial decisions of the Public Defender (*Id.*).

Defendants argue "there is no liberty interest in process itself," citing to *Levin v. Childers*, 101 F.3d 44, 46 (6th Cir. 1996) (*Id.*). Under Defendants' theory, Ohio Revised Code 2947.14 only requires a hearing but guarantees no substantive outcome, and further puts the burden on only the Court to conduct an indigency inquiry (*Id.*). In Defendants' view, therefore, Plaintiff's claim fails under *Childers*.

Defendants further argue they have no money to pay any judgment if they incur liability (*Id.*). They argue the Commission has no budget, and the Public Defender is funded by the state of Ohio and by Hamilton County (*Id.*). As such, Defendants reason that any payment of damages actually comes from Hamilton County, and through it the state, a result implicating the Eleventh Amendment and barred by *Monell v. New York City Dep't. of Social Services*, 436 U.S. 658, 691 (1978) (*Id.*).

Next Defendants argue that Plaintiff's claim calls into question every criminal sentence in which a fine was imposed (*Id.*). Defendants state that principles of federalism and comity preclude the "wholesale re-examination" of state court judgments (*Id. citing Younger v. Harris*, 401 U.S. 37, 44 (1971) and *Catz v. Chalker*, 142 F.3d 279, 293 (6th Cir. 1998) (explaining the *Rooker-Feldman* doctrine barring federal court review of state court judgments)). Finally, Defendants

argue that Plaintiffs are incorrect to use Ohio's wrongful imprisonment statute as a yardstick for damages in this case, because Ohio Rev. Code 2743.48(A) does not apply to misdemeanor offenders (*Id.*). Moreover, Defendants argue the Ohio Court of Claims has exclusive original jurisdiction over such claims (*Id.*).

3. Plaintiff's Replies (docs. 44 & 49)

Plaintiff replies that most of the issues raised by Defendants were already decided by the Court in its August 25, 2005 Order (doc. 44). Plaintiff attacks Defendants' claim that the Public Defender reported his indigency status to the Court, and cites the transcript which shows the following:

> The Court: Does he want me to sentence him today?
>
> Public Defender Attorney Shafer: He does, yes. Mr. Powers is homeless and can't come up with any bond, so he would like to get this over with.
>
> * * *
>
> The Prosecutor: Michael Powers violated his probation by failing. . .to pay fines, court costs and probation fees.
>
> The Court: Anything on those facts, Sir?
>
> Public Defender Attorney Shafer: Nothing, Judge.
>
> The Court: Guilty finding.

According to Plaintiff the transcript speaks for itself, in that Plaintiff's public defender made no request for an inquiry into his indigency status, and no argument that any detention on fines would be unconstitutional under *Bearden v. Georgia*, 461 U.S. 660 (1983) (*Id.*).

Plaintiff attacks Defendants' argument that Rule 56 inferences somehow change the result in this case (*Id.*). Plaintiff argues that though such inferences should be made in favor of the non-moving party, Defendants have failed to show what specific inferences should be made in their favor (*Id.*). Plaintiff further argues that the Public Defender cannot escape liability by claiming he has no control over his employees or over the litigation they pursue (*Id.*). Plaintiff argues Defendants have failed to offer proof that they comply with the requirement that no person be incarcerated for a debt unless he or she has been afforded a hearing to determine whether he or she could pay or was in fact indigent (*Id.*). Plaintiff argues should Defendants have a policy that complies with Constitutional requirements, they could have presented sworn testimony demonstrating they do request indigency hearings, but are routinely turned down by judges (*Id.*). Plaintiff states that none of the evidence proffered by Defendants even addresses the issue in this case, "unconstitutional incarceration for debt and why public defender attorneys do nothing about it" (*Id.*). The only inference to be made based on Defendants' sworn materials, Plaintiff argues, is based on their silence: Defendants systematically and at every level permit indigent Defendants to be incarcerated for debt without the least attempt to obtain a hearing as required by law (*Id.*).

Plaintiff next argues that the lack of a budget does not immunize county officials or entities from liability for unconstitutional policies (*Id.*). Plaintiff distinguishes *Levin v. Childers*, 101 F.3d 44 (6th Cir. 1996), cited by Defendants for the proposition that "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause" (*Id.*). According to Plaintiff, the defendant in Levin had not yet been punished, and therefore the deprivation of a hearing in his case did not amount to a violation of *Bearden* (*Id.*). In the case at hand, argues Plaintiff, he was incarcerated–lost his liberty–after the denial of process, so there is clearly a liberty interest at stake (*Id.*).

Plaintiff argues Defendants offer no authority for the proposition that a state actor may escape liability for violating another's constitutional rights by demonstrating another state entity will have to pay the judgment (*Id.*). Plaintiff further argues that the Court's prior decision should stand that *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) does not remove Defendants from this case (*Id.*). Similarly, Plaintiff argues the Court has already rejected the application of the *Rooker-Feldman* doctrine and *Younger* abstention to this case (*Id.*).

Finally, in Plaintiff's Reply in support of his motion for summary judgment on damages, he argues that Defendant misperceives his citation to the Ohio wrongful imprisonment statute (doc. 49). Plaintiff states he is simply looking for an appropriate guideline for what a day in jail is worth, and is not looking to file a claim pursuant to Ohio Rev. Code § 2743.48 (*Id.*). Plaintiff argues Defendants have not given any

grounds for paying less than $118.71 per night, so the Court should approve such amount.

III. ANALYSIS

Having reviewed this matter, the Court must again reject Defendants' argument that this case is about individual representation offered to indigents, thus taking it out of the scope of Section 1983. Plaintiff has alleged that Defendants have administered an unconstitutional policy under which indigent defendants were incarcerated due to unpaid fines. Although Defendants offer copious amounts of information about their respective roles, they have not raised a genuine dispute of material fact as to the existence of such a policy. *City of St. Louis v. Praprotinik*, 485 U.S. 112, 127 (1988). Defendants' attempt to frame the case as one in which individual attorneys are making tactical decisions falls flat, when the record before the Court shows that defendants systematically were incarcerated on fines with no request for an inquiry into their ability to pay. There is no tactical value in failing to uphold fundamental constitutional rights.

The Commission attempts to delineate its role as primarily budgetary, yet the statute setting it in place clearly envisions that it has a role to cooperate in maintaining standards for the training of legal staff for the Public Defender. Ohio Revised Code 120.14(C)(3). Moreover, all parties who contract with the Commission must mandatorily "[c]omply with all statutory duties and other laws applicable to county public defenders." Ohio Revised Code 120.14(F)(3). The Commission, therefore, has more of a role to play than

merely setting budgets. Its role includes setting general operational policy so as to ensure the provision of representation to indigent defendants. In all of its contracting, and its standard bearing, it has an obligation to uphold the rights of indigent defendants.

The Public Defender plays an even more obvious role. The law requires that the Public Defender provide legal representation to indigent defendants who are charged with a violation that could result in a loss of liberty. Ohio Rev. Code 120.16(A)(1). Clearly this fundamental mission is not met where there is a systematic failure to protect the liberty of defendants who face incarceration on fines but have no means to pay them.[2]

Plaintiff's argument is well-taken that Defendants have failed to rebut his *prima facie* case. Defendants proffer no affidavit proof or otherwise showing they ever requested a hearing on indigency so as to prevent unlawful incarceration. Defendants argue correctly that as nonmoving party inferences must be made in their favor, but they completely fail to indicate to the Court what inferences should be made in their favor.

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[2] The Court noted in its earlier Order, and reiterates again that Judge Timothy Hogan, who chaired the Standing Criminal Committee in 1982, issued a memorandum instructing the court administrator to "draft a procedure to eliminate the problem" of incarcerating indigents (doc. 34). However, the problem was not eliminated and ultimately has persisted for decades. The Public Defender has offered no evidence showing how his office ever challenged the practice. The trial transcripts of Plaintiff, Ballew, Nevling, and Scruggs show attorneys working for the Public Defender acceded to the practice.

The Court also does not find well-taken Defendants' position that this case calls into question the validity of state court criminal sentences, in contravention of *Heck v. Humphrey*, 512 U.S. 477 (1994) (*Id.*). As the Court explained in its prior Order, *Heck* has no application to this case (doc. 34, *citing Spencer v. Kemna*, 523 U.S. 1, 17 (1998), and *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003). Assuming every single class member defendant was in fact guilty and properly sentenced to pay a fine, other alternatives to "stay to pay" exist under which a state may constitutionally collect its fines from indigents. *Tate v. Short*, 401 U.S. 395, 400 n.5 (1971), *Williams v. Illinois*, 399 U.S. 235 (1970). Plaintiffs in this case raise no challenge to the validity of the sentence, but rather to the lack of inquiry into the indigency of defendants, which could have prevented unconstitutional incarceration.[3]

The Court squarely rejects Defendants' interpretation of *Levin v. Childers*, 101 F.3d 44, 46 (6th Cir. 1996), for the proposition that "there is no liberty interest in process itself." Plaintiff is correct that *Levin* is not on point. Clearly there is a "liberty interest" at stake when one is jailed for inability to pay a fine.

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[3] Defendants are incorrect in their statement that this case boils down to the simple proposition of whether *Heck* and *Polk* are still controlling law in this circuit, or not. The Court found them inapplicable. This case is rather about whether *Bearden*, 461 U.S. 660 (1983), is still controlling law in this circuit, and it definitely is.

It strikes the Court as ironic in this case pertaining to indigency that Defendants raise as a defense to liability the argument that if the Commission is held liable, the Commission would be unable to pay the judgment. Plaintiff's position that Defendants offer no authority for such proposition is well-taken. Defendants further allude to Eleventh Amendment implications but fail to spell out how either Defendant is an alter ego of the state of Ohio. Although both Defendants are creatures of Ohio statute, and receive significant funding from the state, the Commission, which oversees the Public Defender, reports to the Hamilton County Commissioners. Ohio Rev. Code § 120.14. It appears to the Court that both Defendants are county agencies, which do not partake in the state's Eleventh Amendment immunity. *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

Defendants' remaining arguments, as pointed out by Plaintiff, are resurrected from earlier motions. Defendants' argument that *Monell* shields them from liability fails, as the Court has already found they had a policy under which indigent violators were jailed due to unpaid fines. *City of St. Louis v. Praprotinik*, 485 U.S. 112, 127 (1988). The Court also already found the *Rooker-Feldman* doctrine had no bearing on this case because the Court is not reviewing the state court judicial decision, but is rather reviewing a custom and policy of the Defendants of failing to request indigency hearings (doc. 34). Likewise, the Court found that *Younger* abstention is inapplicable because this case is not about a claim that the underlying sentence has been or should be invalidated (*Id.*).

Having reviewed this matter, the Court is satisfied that Plaintiff has raised a *prima facie* Section 1983 case challenging Defendants' unconstitutional policy of failing to request indigency hearings to determine whether defendants had the ability to pay fines levied against them. Defendants have failed to raise a genuine issue of material fact as to the existence of such a policy, and the Court rejects their various arguments attempting to avoid liability or place responsibility elsewhere. There is no question in the Court's view that indigent defendants represented by the Hamilton County Public Defender were jailed on fines that they were unable to pay. Defendants have a statutory and constitutional duty to provide effective representation to protect the rights of class members. The practice in Hamilton County of jailing on fines without an indigency inquiry appears to have become so endemic that the entire system considered it normal. As the Defendants failed to address the issue, Plaintiff was entirely correct to do so. The Court thus grants summary judgment to Plaintiff class on the question of liability.

The remaining issue is that of damages. The parties quarrel about an appropriate amount of money to be given to class members, but jump over an intermediary step. It appears to the Court that the previously-approved class definition broadly includes "All persons who, without an indigency hearing, have been incarcerated . . ." and such definition could include those who were able to pay their fines, but simply refused to. "If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection."

Bearden, 461 U.S. at 668. Because in this case no inquiry was made into the reasons why class members were not paying fines, that question remains open. Under *Bearden*, it appears that those defendants simply refusing to pay were justly incarcerated as they were not genuinely indigent.[4] Such defendants clearly do not merit compensation for their time in jail. The Court finds the best way to remedy this issue is to modify the class definition to include only those persons *who were in fact indigent*. The Court exercises its authority to modify *sua sponte* the class definition accordingly. *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1213-14 (6th Cir. 1997), *Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521, 1543 n.44 (D.C. Cir. 1983) (en banc) (Spottswood, J., concurring in part, dissenting in part) (noting that "[f]ederal courts possess ample authority to redefine the class to bring it within acceptable

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[4] Clearly the Public Defender by definition serves clients who are indigent. Ohio Rev. Code 120.16(A)(1). However, Ohio Rev. Code 120.03(B)(1) defines indigency in terms of inability to pay an attorney and all other necessary expenses of representation. It is not necessarily true that all those who cannot afford representation and thus need a court-appointed attorney cannot likewise afford to pay a small fine. Plaintiff argued earlier in opposition to Defendants' motion for summary judgment that where over 600 persons were jailed on fines less than $100.00, it may be fairly presumed that such persons were indigent and unable to pay the fine. The Court finds it more likely than not that this unrebutted presumption is correct. However, if a defendant qualified for court-appointed representation but had adequate funds to pay a small fine and *refused* to do so, such defendant is not "genuinely" indigent for purposes of this case.

limits."). Thus the Court modifies the class definition accordingly:

> All persons who were in fact indigent, who, without an indigency hearing, have been incarcerated in a Hamilton County correctional facility from August 21, 2000 to present, as a result of the nonpayment of a fine and or costs, including persons who violated probation following a "stay to pay sentence."

Having modified the class definition to include only those whose rights were in fact violated, the Court now may address the remedy to which class members are entitled. Plaintiff argues that as the Ohio legislature has valued a night of wrongful incarceration at $118.71 per night this is a reasonable figure to award class members. The Court finds well-taken Plaintiff's position that Defendants have not provided any grounds for paying less than $118.71 per night, and rejects Defendants' theory that Plaintiff may not reference Ohio Rev. Code § 2743.48 as a guide in making such a determination. However, Plaintiff's method of computing damages may be but one way to arrive at a proper figure. The Court finds it appropriate, therefore, to stay a ruling on Plaintiff's damages motion until it has conducted a hearing on the matter. At the same hearing, the Court would request the parties offer their views as to the implementation of judgment in this matter, that is, the parties' views on how to make a determination of who genuinely belongs within the class.

IV. CONCLUSION

For the reasons indicated herein, the Court finds Plaintiff's Motions for Summary Judgment well-taken. Accordingly, the Court GRANTS IN PART Plaintiff's Motion for Summary Judgment on Liability (doc. 36), to the extent that it finds relief appropriate for those who fall within the modified class definition. The Court however STAYS consideration of Plaintiff's Motion for Summary Judgment on Damages (doc. 39) pending a hearing, which it sets at 10:00 A.M. on March 15, 2006. At such hearing the Court further requests the parties to advise the Court as to the implementation of this Order.

SO ORDERED.

Dated: February 7, 2006

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO. 1:02-CV-00605

[Filed August 23, 2005]

MICHAEL POWERS,	)
	)
Plaintiff,	)
	)
v.	)
	)
HAMILTON COUNTY PUBLIC DEFENDER COMMISSION, *et al.*,	)
	)
Defendants.	)
	)

ORDER

On August 21, 2002, Plaintiff Michael Powers ("Powers") brought the present action on behalf of himself and others similarly situated alleging that Defendants Hamilton County Public Defender Commission, Office of the Public Defender of Hamilton County, and Simon L. Leis, Jr. ("County Defendants"), systematically failed to provide them with representation on the issue of their ability to pay fines

and/or costs assessed by Hamilton County Municipal Court, resulting in their incarceration despite their inability to pay those fines/costs (doc. 1). An amended complaint was filed on June 4, 2003, adding defendants Hamilton County, OH, and County Commissioners Phillip Heimlich, Todd Portune, and John Dowlin, ("Hamilton County Defendants") (doc. 10). All Defendants filed an answer to the amended complaint on June 20, 2003 (doc. 11). Powers then filed a motion to certify class action on August 5, 2003 (doc. 12). Defendants responded on September 12, 2003 (doc. 15) and Powers replied on October 8, 2003 (doc. 20). On November 5, 2003, Defendants filed a motion for summary judgment (doc. 23). Powers filed a response on December 11, 2003 (doc. 28), requesting oral arguments, and Defendants replied on December 18, 2003 (doc. 29). A hearing regarding the motions for class certification and summary judgment was held in before this Court on January 15, 2004. Therefore the matters of summary judgment and class certification are ripe for decision. For the following reasons the Court grants in part and denies in part the motion for summary judgment (doc. 23) and grants Plaintiff's motion for class certification (doc. 12).

I. RELEVANT FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The facts relevant to the determination of the instant motion, as drawn from the Amended Complaint (doc. 10), may be summarized as follows. On January 23, 2002, Powers, represented by the Hamilton County Public Defender's Office, pled no contest to a charge of reckless operation of a motor vehicle in Hamilton County Municipal Court Case No.

CO/TRC/26368A. He was found guilty of the charge and was sentenced to thirty days in the Hamilton County Justice Center, twenty-seven days of which were suspended, with the remaining three days to be served in a driver intervention program. Additionally, Powers was fined $250 and court costs. On March 22, 2002, he was re-arrested and charged with violating probation for non-payment of the fine, to which he pled no contest and was found guilty (doc. 30). Powers's probation was subsequently terminated and the original thirty day sentence was imposed. Powers alleges that counsel was not provided by the Hamilton County Public Defender Office to address the issue of whether he was unable to pay the fine and costs because he was indigent.[1] On April 22, 2002, a hearing was held on a motion to mitigate filed by a private attorney. Judge Grant granted the motion, imposing "credit for 10 days on fine, balance of sentence and fine remitted."

At the time he was released, Powers had served at least one day in the Hamilton County Jail for non-payment of a fine. He alleges that his incarceration was improper because he was not given a indigency hearing to determine his ability to pay his fine. He avers that all County Defendants have a statutory

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[1] It is noted that County Defendants dispute several of Powers's allegations in their Answer. However, because the facts are to be taken in a light most favorable to Powers and Defendants' motion for summary judgment presents legal reasons that do not rest on any disputed fact, these discrepancies are not germane to this discussion.

duty under Ohio Rev. Code § 2947.14[2] to request such

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[2] Ohio Rev. Code § 2947.14 provides, in relevant part:
(A) If a fine is imposed as a sentence or a part of a sentence, the court or magistrate that imposed the fine may order that the offender be committed to the jail or workhouse until the fine is paid or secured to be paid, or the offender is otherwise legally discharged, if the court or magistrate determines at a hearing that the offender is able, at that time, to pay the fine but refuses to do so. The hearing required by this section shall be conducted at the time of sentencing.

(B) At the hearing, the offender has the right to be represented by counsel and to testify and present evidence as to the offender's ability to pay the fine. If a court or magistrate determines after considering the evidence presented by an offender, that the offender is able to pay a fine, the determination shall be supported by findings of fact set forth in a judgment entry that indicate the offender's income, assets, and debts, as presented by the offender, and the offender's ability to pay.

(C) If the court or magistrate has found the offender able to pay a fine at a hearing conducted in compliance with divisions (A) and (B) of this section, and the offender fails to pay the fine, a warrant may be issued for the arrest of the offender. Any offender held in custody pursuant to such an arrest shall be entitled to a hearing on the first regularly scheduled court day following the date of arrest in order to inform the court or magistrate of any change of circumstances that has occurred since the time of sentencing and that affects the offender's ability to pay the fine. The right to the hearing on any change of circumstances may be waived by the offender. . . .

(D) No person shall be ordered to be committed to a jail or workhouse or otherwise be held in custody in satisfaction of a fine imposed as the whole or a part of a sentence except as provided in this section . . .

a hearing and to ensure that a person is not jailed for failure to pay fines/costs without inquiry into his indigency status. Powers further alleges that this is but an example of a general policy of the County Defendants to deprive indigent defendants of their rights. Powers contends that the statute creates a liberty interest to be free from incarceration for a non-willful failure to pay fines, and he therefore brings a civil rights action pursuant to 42 U.S.C. § 1983 alleging that he, and others similarly situated, were deprived of their rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. He additionally raises a state law legal malpractice claim.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Applicable Legal Standard

Although a grant of summary judgment is not a substitute for trial, it is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; *see also, e.g., Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *Osborn v. Ashland County Bd.* of Alcohol, Drug Addiction and Mental Health Servs., 979 F.2d 1131, 1133 (6th Cir. 1992) (per curiam). In reviewing the instant motion, "this Court must determine whether the evidence presents a sufficient disagreement to

require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993), *quoting in part Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (internal quotation marks omitted).

The process of moving for and evaluating a motion for summary judgment and the respective burdens it imposes upon the movant and the non-movant are well settled. First, "a party seeking summary judgment . . . bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also LaPointe*, 8 F.3d at 378; *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir. 1992); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). The movant may do so by merely identifying that the non-moving party lacks evidence to support an essential element of its case. *See Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1389 (6th Cir. 1993).

Faced with such a motion, the non-movant, after completion of sufficient discovery, must submit evidence in support of any material element of a claim or defense at issue in the motion on which it would bear the burden of proof at trial, even if the moving party has not submitted evidence to negate the existence of that material fact. *See Celotex*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As the "requirement [of the Rule] is that there be no genuine issue of *material* fact," an "alleged

factual dispute between the parties" as to some ancillary matter "will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48 (emphasis added); *see generally Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989). Furthermore, "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252; *see also Gregory v. Hunt*, 24 F.3d 781, 784 (6th Cir. 1994). Accordingly, the non-movant must present "significant probative evidence" demonstrating that "there is [more than] some metaphysical doubt as to the material facts" to survive summary judgment and proceed to trial on the merits. *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993); *see also Celotex*, 477 U.S. at 324; *Guarino*, 980 F.2d at 405.

Although the non-movant need not cite specific page numbers of the record in support of its claims or defenses, "the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party relies." *Guarino*, 980 F.2d at 405, *quoting Inter-Royal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989) (internal quotation marks omitted). In contrast, mere conclusory allegations are patently insufficient to defeat a motion for summary judgment. *See McDonald v. Union Camp Corp.*, 898 F .2d 1155, 1162 (6th Cir. 1990). The Court must view all submitted evidence, facts, and reasonable inferences in a light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Adickes v. S.H. Kress & Co.*, 398

U.S. 144 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). Furthermore, the district court may not weigh evidence or assess the credibility of witnesses in deciding the motion. *See Adams v. Metiva*, 31 F.3d 375, 378 (6th Cir. 1994).

Ultimately, the movant bears the burden of demonstrating that no material facts are in dispute. *See Matsushita*, 475 U.S. at 587. The fact that the non-moving party fails to respond to the motion does not lessen the burden on either the moving party or the Court to demonstrate that summary judgment is appropriate. *See Guarino*, 980 F.2d at 410; *Carver v. Bunch*, 946 F.2d 451, 454-55 (6th Cir. 1991).

B. Law and Discussion

1. Plaintiff's claim under *Heck v. Humphrey*.

County Defendants first contend that Powers does not have a case or controversy to bring this claim, as required by Article III of the United States Constitution, because the instant action is barred by the Supreme Court decision in *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, the Supreme Court held that:

> when a state prisoner seeks damages in a §1983 suit, the district court must consider whether a judgment in favor of the plaintiff would *necessarily imply the invalidity of his conviction or sentence*; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will

> not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.

512 U.S. 487 (emphasis added). Therefore, because Plaintiff does not claim that his underlying sentence has been invalidated, this Court must decide whether a judgment in favor of Powers would "necessarily imply the invalidity of his conviction or sentence." *Id.* To aid the district courts in making such a decision, the Supreme Court, in *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) wrote "If, for example, petitioner were to seek damages 'for using the wrong procedures, not for reaching the wrong result,' and if that procedural defect did not 'necessarily imply the invalidity of' the revocation, then *Heck* would have no application [at] all." (citations omitted).[3]

The Sixth Circuit thoroughly explored this issue in *Dotson v Wilkinson*, 329 F.3d 463 (6th Cir. 2003). There, the plaintiffs were prisoners challenging parole eligibility determinations and parole release determinations, and the success of either challenge would have only resulted in a new hearing. The court found that:

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[3] As the Sixth Circuit did in *Fox v. Van Oosterum*, 176 F.3d. 342, FN 8 (6th Cir. 1999), this Court notes that five Justices in *Spencer* indicated they would not apply *Heck* to cases where the plaintiff is no longer in custody. 523 U.S. 1. This Court does not need to reach that issue today because *Heck* does not apply in this case for other reasons.

> where a prisoner does not claim immediate entitlement to parole or seek a shorter sentence but instead lodges a challenge to the procedures used during the parole process as generally improper or improper as applied in his case, and that challenge will at best result in a new discretionary hearing the outcome of which cannot be predicted, we hold such a challenge cognizable under section 1983.

Id. at 472.

Powers's three causes of action are based on his alleged deprivation of a hearing to determine his indigency status before he was incarcerated for non-payment of fines and costs. Like the plaintiffs in *Dotson*, Powers is seeking Section 1983 damages because of a defect in procedure, his denial of an indigency hearing, not a faulty conclusion. *Id.* A favorable outcome for Powers would, at best, result in a hearing on the issue of indigency at the time of his incarceration for non-payment of fines and costs, and would not necessarily imply the invalidity of his incarceration. Therefore, *Heck* is not applicable to this action and Powers's Section 1983 claims are cognizable. Thus, the County Defendants' motion for summary judgment is not proper on this basis.

2. Plaintiff's Indigency Status at Incarceration

County Defendants' second argument for summary judgment is that Powers was not indigent at the time of his sentencing on January 23, 2003, and therefore under *Bearden v. Georgia*, 461 U.S. 660 (1983), the

trial court properly incarcerated Powers for willful refusal to pay a criminal fine. Conversely, Powers contends in his response that he does not need to establish that he would have been indigent in order to establish a claim for violation of due process (doc. 28). County Defendants, in their reply, attempt to clarify their position, stating "the import of the County Defendants' argument is that no hearing is necessary once a defendant has refused to pay a criminal fine" (doc. 29).

County Defendants are correct in their understanding that under *Bearden* a trial court may impose incarceration when a defendant has wilfully refused to pay a criminal fine. 461 U.S. 672. However the *Bearden* Court also found that, "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay." *Id.* Additionally, Ohio Revised Code § 2947.14 requires "prior to imprisonment for failure to pay a debt, that a hearing be held to determine whether the failure to pay was due to indigency or, instead, due to unwillingness to pay . . . this is precisely what the Fourteenth Amendment requires." *Alkire v. Irving*, 330 F.3d 802, 819 (6th Cir. 2003). Therefore, County Defendants' contention that an indigency hearing is not required is incorrect.

Additionally, County Defendants' assertion that Powers was not indigent at the time of his incarceration[4] and therefore was properly incarcerated

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[4] For example, County Defendants assert that "Plaintiff Powers *was employed* at the time of his sentencing" and "Plaintiff did not

under *Bearden*, is immaterial. "the administration of an unconstitutional policy by a public defender agency can be actionable under Section 1983." *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972). Powers's ability to pay his fine at the time of his incarceration is not at issue here. Powers's contention, instead, is that he was not given an indigency hearing before he was incarcerated for failure to pay a fine. Therefore, summary judgment is also not proper on this basis.

3. Failure to Establish a Policy, Custom, or Practice

County Defendants' also contend that summary judgment is proper because Powers has failed to support allegations of a policy, custom, or practice to deprive defendants of their constitutional rights. To support his Section 1983 claim, Powers must be able to a) identify a policy, b) connect the policy to the County Defendants, and c) show that the particular injury was incurred because of the furtherance of that policy. *Jarvis v. Marcum*, 77 Fed. Appx. 308, 310 (6th Cir. 2003). Therefore, the Court must look at the evidence produced by Powers to show that it was a policy of Defendants to not request an indigency hearing when a client was facing incarceration for failure to pay fines or court costs.

As evidence of such a policy, Powers first points to the statutory duties of the Public Defender found in Ohio Rev. Code § 120.16, which requires a county

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attempt to reschedule his payments or pay an amount less than the balance owed" (doc. 23).

public defender to provide legal representation to indigent adults at every stage of the proceedings. He claims that the County Defendants do not contest the fact that they have this duty to provide legal services in disputed cases of probation violation, or that they appear at arraignments. Powers further alleges that it is undisputed that staff members of the Public Defender never ask for an indigency hearing before a probation violator is incarcerated for fines. To prove this point he has produced seven sample transcripts where no hearing request was made, and judges' sheets which contain no notation that a request for an indigency hearing or findings was denied. Powers claims that because County Defendants have not produced any evidence showing that indigency hearings are ever requested, the Court must come to the conclusion that this is a widespread practice. Powers points to *City of St. Louis v. Praprotinik*, 485 U.S. 112, 127 (1988), which recognized that "a plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law.'" (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

Taking all factual inferences in favor of the non-moving party, as the Court is required to do in considering a motion for summary judgment, it is clear to the Court that the Public Defender Commission and the Hamilton County Public Defender had a wellsettled custom or policy of not asking for an indigency hearing before a probationer is incarcerated for failure to pay a fine. Powers has produced seven sample transcripts where no hearing request was

made, and judges' sheets which contain no notation that a request for an indigency hearing or findings was denied. Defendants have not produced any evidence to the contrary, and the Court can only conclude that the Commission and Public Defender had a policy under the meaning of Section 1983, under which indigent violators were incarcerated due to unpaid fines. *City of St. Louis v. Praprotinik*, 485 U.S. 112, 127 (1988). Summary Judgment is therefore not appropriate as to the Hamilton County Public Defender Commission and the Hamilton County Public Defender.

However, the Court finds that under the same analysis the facts of this case indicate the Commissioners and the County are too many steps removed from the challenged policy of non-inquiry to be liable for it. Powers alleges that Defendants Hamilton County and the Hamilton County Commissioners Phillip Heimlich, Todd Portune, and John Dowlin are "responsible for the policy of Hamilton County as established by such policymakers as the Presiding Judge of the Hamilton County Municipal Court" (doc. 10). However, to state a 42 U.S.C. § 1983 claim, a plaintiff must prove the deprivation of a right secured under the Constitution or federal law, and that this deprivation was *caused* by a person acting under the color of state law. *Brock v. McWherter*, 94 F.3d 242, 244 (6th Cir. 1996) (emphasis added). A local governing body, such as Hamilton County or the Hamilton County Commissioners, cannot be liable for a Section 1983 claim on a *respondeat superior* theory. *Monell v. Dep't of Social Servs. of New York City*, 436 U.S. 658, 691 (1978). The *Monell* court further explained that "it is when execution of a government's policy or custom, whether

made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* Therefore, these particular County Defendants could only be liable in a § 1983 action if it is shown that the violation alleged resulted from policies or customs that they created or were created by an entity or person they control. *Id.*

Powers makes no allegation that Hamilton County and the Hamilton County Commissioners were *directly* responsible for the deprivation of his constitutional rights, so the Court must look for evidence that these Defendants had real control over the decisions or policies of the Hamilton County Municipal Court. This issue was specifically addressed by the Northern District of Ohio, on remand from the Sixth Circuit in *Alkire v. Irving*, 2003 U.S. Dist. LEXIS 17856 (2003). There, the court held that Holmes County was not liable for the actions of a judge in the Holmes County Court because there was no evidence that the County had any control over the judge's actions, despite the County's role as funder for the Court. *Id.* at 15-16. The Sixth Circuit found it particularly important that the Holmes County Court was created by Ohio statute, not the County, and that the County had no power to "expand or decrease the jurisdiction of the County Court; it had no authority over the decision-making of the Court; it does not hire the County Court judges, nor can it terminate their employment." *Id.* The relationship between the Hamilton County Municipal Court and the Hamilton County Commissioners/Hamilton County mirrors that of the Holmes County Court's relationship with Holmes

County[5]. Any policy of the Hamilton County Municipal Court cannot be attributed to Hamilton County or the Hamilton County Commissioners.

Therefore, because Powers has failed to satisfy the requirements of *Monell* as to Defendant Commissioners of Hamilton County Phillip Heimlich, Todd Portune and John Dowlin, and Defendant Hamilton County, Ohio, summary judgment is granted for these Defendants.

The Court need not analyze whether Defendant Sheriff Leis had a policy of incarcerating defendants for fines despite knowledge of the unconstitutionality of the practice, because, as explained in more detail directly below, the Court finds Leis had no duty to second-guess a trial judge's order.

4. Defendants Claim No Duty of Inquiry on Their Part

County Defendants contend summary judgment is proper because they "were under no obligation or duty to conduct an independent assessment of Plaintiff Powers's ability or desire to pay a fine" (doc. 23). County Defendants instead repeatedly claim that it is the trial court's duty to make that assessment and to

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[5] Municipal Courts are established by the Ohio Revised Code § 1901.01. The jurisdiction of the Hamilton County Municipal Court's jurisdiction is set forth in § 1901.02 of the Ohio Revised Code. The term limits and election procedures of judges are controlled by Ohio Revised Code § 1901.06. The removal of municipal judges are mandated by Ohio Revised Code §§ 3.07-3.10.

appoint counsel if a plaintiff desires representation. Although County Defendants are seemingly correct in this claim, the duty of the trial court is not at issue here. Powers's claims arise from the actions of the Public Defender and the Sheriff, which he alleges were the result of a policy adopted by all County Defendants. Any obligation the trial court may have in assessing a defendant's indigency does not necessarily absolve County Defendants of their responsibilities.

Here, as County Defendants admit, Powers was represented by the Hamilton County Public Defender's Office at both his sentencing on January 23, 2002 and at the probation termination on March 23, 2002. However, the record reflects no time when either of the Public Defenders representing Powers raised the question of his ability to pay fines or costs as an issue in relation to his incarceration. The record likewise reflects no inquiry by Defendant Leis into whether Powers was afforded an indigency hearing before incarcerating him. This Court must therefore determine the extent of the County Defendants' responsibilities.

As stated above, the Fourteenth Amendment of the Constitution and Ohio Revised Code § 2947.14 require that a hearing be held to "determine whether failure to pay was due to indigency or, instead, due to unwillingness to pay." *Alkire*, 330 F.3d 819. A public defender is obligated under Ohio Revised Code § 120.16 to "provide legal representation to indigent adults and juveniles who are charged with the commission of an offense or act that is a violation of a state statute and for which the penalty or any possible adjudication includes the potential loss of liberty and

in post-conviction proceedings as defined in this section." Further, they must "provide the legal representation . . . at every stage of the proceedings following arrest, detention, service of summons, or indictment." *Id.* It follows that the Public Defender did have a duty to represent Powers on the issue of indigency before his incarceration for failure to pay fines or costs. Summary judgment is not proper for Defendants Hamilton County Public Defender Commission and Office of the Public Defender of Hamilton County on this ground.

This is not the case, however, with Defendant Leis, the Hamilton County Sheriff. While Ohio Revised Code § 2947.14 mandates a hearing, it creates no duty for a Sheriff to make any determination on a defendant's ability to pay a fine or costs. The Sheriff instead has a duty, under Ohio Revised Code § 311.07(A), to "execute all warrants, writs, and other process directed to the sheriff by any proper and lawful authority of this state." There is no evidence showing that the order to incarcerate Powers was not directed to Defendant Leis by a proper or lawful authority. Therefore, Defendant Leis had no legal obligation to inquire into Powers's indigency status.

Powers suggests that the Sixth Circuit's holding in *Denton v. Bedinghaus*, 40 Fed. Appx. 974, 2002 WL 1611472 (6th Cir. 2002), precludes this finding. However, what the court in *Denton* found was that county employees are not entitled to quasi-judicial immunity when they are being sued in their official capacity. *Id.* at *979. That case does not apply to this issue. The question raised here is not whether Defendant Leis is being protected by some immunity,

but rather whether he had a duty to independently inquire into Powers's indigency before incarcerating him. This Court holds that he did not. Thus, summary judgment is granted for Defendant Leis.

5. Defendants Hamilton County Public Defender and Hamilton County Public Defender Commission as State Actors

County Defendants further assert that summary judgment is proper for the claims against Defendants Office of the Hamilton County Public Defender and Hamilton County Public Defender Commission for two reasons. First, they claim that these Defendants do not act under the color of state law as contemplated by 42 U.S.C. § 1983. Secondly, they aver that these Defendants were merely acting in an administrative role and did not form an attorney-client relationship with Powers, so no malpractice could have occurred. Plaintiff responds that under *Polk County v. Dodson*, 454 U.S. 312 (1981), the administration of an unconstitutional policy by a public defender agency can be actionable under Section 1983 (docs. 28 & 31) (also citing *Miranda v. Clark County*, 319 F.3d 465, 469-70 (9th Cir. 2003) in which the head of a public defender office qualified as a state actor when creating and implementing a policy concerning public defender staff attorneys.) In such an instance, Plaintiff argues, the state-actor issue is eliminated (*Id.*). Plaintiff further states that Defendant "flatly admits there is no attorney client relationship between Defendant Hamilton County Public Defender Commission or Defendant Hamilton County Public Defender and Plaintiff" (*Id.*).

Defendants reply that Plaintiff has conceded there is no attorney-client relationship between Powers and the Public Defender or the Commission in an attempt to bolster his policy and practice theory (doc. 29). Defendants reiterate their position that only the Court is required to inquire into the reasons for an individual's failure to pay a fine or costs (*Id.*).

The Court finds Plaintiff's argument under *Polk* welltaken and does not find summary judgment appropriate as to the Public Defender and the Public Defender Commission under Defendants' theory. The Court is satisfied that the administration of an unconstitutional policy by a public defender agency can be actionable under Section 1983. However, it appears clear that both parties are in agreement there was no attorney client relationship between these Defendants and Plaintiff, so with this fact established, there is no basis for a legal malpractice claim against these Defendants. Accordingly, the Court grants summary judgment to Defendants on Plaintiff's malpractice theory.

6. Defendants' Remaining Theories

Defendants raise three remaining theories. The Court need not reach Defendants' Eleventh Amendment immunity argument as to Defendant Leis, as the Sheriff has been dismissed from this case on other grounds. Defendants further invoke the *Rooker-Feldman* doctrine which prohibits a federal court from reviewing a state court judicial decision (doc. 29). Defendants err, however, as the court is not reviewing the state court judicial decision in this matter, but is rather reviewing a custom and policy of the Public

Defender Office and the Public Defender Commission of failing to request indigency hearings. *Hood v. Keller*, 341 F.3d 593, 598 (6th Cir. 2003). Finally, Defendants argue that the *Younger* abstention doctrine is applicable to this case so long as Plaintiff has the opportunity to raise his issue on appeal (doc. 29). As indicated above, the Court finds this case is about a defect in procedure and not about a claim that the underlying sentence has been or should be invalidated. Plaintiff asks for no injunction of a state court proceeding. Therefore, *Younger* abstention is inapplicable.

Having conducted the above analysis, the only remaining Defendants in this case are the Hamilton County Public Defender and the Hamilton County Public Defender Commission, and the remaining claims are those pursuant to Section 1983 for violation of Fifth, Sixth, and Fourteenth Amendment rights. Having established that these Defendants and claims withstand Defendants' summary judgment motion, the Court proceeds to Plaintiff's motion for class certification (doc. 12).

III. PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff moves the Court pursuant to Fed. R. Civ. P. 23b(b) and Local Rule 23.2 for certification of the following class:

> All persons who, without an indigency hearing, have been incarcerated in a Hamilton County correctional facility from August 21, 2000 to present, as a result of the nonpayment of a fine

and or costs, including persons who violated probation following a "stay to pay sentence" (docs. 12 & 32).

Plaintiff proffers Exhibit C, a document prepared by the Sheriff's office personnel entitled "Charges with Guilty Dispositions-Fines Only" (*Id.*). Exhibit C consists of over 1,311 entries of fines being served by about 1,000 persons during the two year time period starting in August 2000 (*Id.*). This Exhibit shows that nearly 600 of the fines being served were for less than $100.00, some 300 individuals served time for fines of less than $50.00, and that nearly 100 fines being served were for amounts less than $20.00 (*Id.*). Plaintiff further provides the evidence of journal entries from Hamilton County Municipal Court showing how persons are typically committed on fines, and showing that some judges have a stamp reading "commit on fines" (*Id.*). The practice of incarcerating indigents has persisted for years: Plaintiff proffers a memorandum on the subject from the Standing Criminal Committee, chaired by Judge Timothy Hogan on June 24, 1982 (*Id.*). At such time, the Committee instructed the court administrator to "draft a procedure to eliminate the problem" (*Id.*). Plaintiff argues that it may be fairly presumed that where over 600 persons were incarcerated on fines less than $100.00, such persons were indigent and unable to pay the fine (*Id.*).

Defendants oppose both Plaintiff's motion and Plaintiff's class definition, arguing that his definition is unfairly expansive, as the original definition applied to "all indigent persons" (doc. 12) where the clarified definition (doc. 32) applies to "all persons who without

an indigency hearing have been incarcerated" (doc. 33). The Court finds Defendants' objection to the class definition lacking in merit. If anything, a class definition adding "no indigency hearing" is narrower than a class definition without such a constrictive clause. The original definition would have included those who had received an indigency hearing, and obviously such a definition is overbroad in the context of the present lawsuit which challenges the lack of such a hearing. Moreover, Defendants have in no way been prejudiced by this modification of the class definition, as they have had plenty of time to file any subsequent briefing on the issue.

Defendants oppose Plaintiff's motion arguing (1) class certification is inappropriate because the named Plaintiff does not have a case or controversy before the Court, (2) Plaintiff's class is not maintainable solely by its designation as such through conclusory presumptions, and (3) Plaintiff's alleged class does not meet the requirements of Fed. R. Civ. P. 23 (doc. 15). Defendants' first argument lacks merit, as explained in Section II.B.1 above. The remaining two arguments will be addressed in the Court's analysis below.

A. Applicable Legal Standard

The district court has broad discretion in deciding whether to certify a class. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). A class action may only be certified if the court is satisfied after a "rigorous analysis" that the prerequisites of Rule 23(a) have been met. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). Maintainability as a class action may be determined by the pleadings, although it may

be necessary for the court to probe behind the pleadings to ensure that the prerequisites of Rule 23 have been met. *Id.* at 160.

The party seeking to utilize the class action device bears the burden of proof. *Senter v. General Motors Corp.*, 532 F.2d 511, 522 (6th Cir. 1976). In order for a class to be certified, all four prerequisites of Rule 23(a) must be met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Once those prerequisites are met, then the party seeking certification must demonstrate that the action qualifies under at least one of the subcategories of Rule 23(b). *Id.* In the case at hand, Plaintiff posits that he has met the requirements under the subcategory of Rule 23(b)(3).

I. Requirements of Federal Rule of Civil Procedure 23(a)

In order to proceed as a class action, the party seeking certification must demonstrate that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). As no class action may be maintained without meeting these prerequisites, an analysis of these factors is appropriate.

A. Rule 23(a)(1): Numerosity

The first requirement of Rule 23(a) is that the class be so numerous that joinder of all members would be impracticable. Fed. R. Civ. P. 23(a)(1). The plaintiff need not demonstrate that it would be impossible to join all the class members; rather, he need simply show that joinder in this case would be difficult and inconvenient. *Day v. NLO, Inc.*, 144 F.R.D. 330, 333 (S.D. Ohio 1991); *see also Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 63 (S.D. Ohio 1991) (stating "[s]atisfaction of the numerosity requirement does not require that joinder is impossible, but only that plaintiff will suffer a strong litigational hardship or inconvenience if joinder is required."). There is no strict numerical test used to determine whether joinder is impracticable. *Senter*, 532 F.2d at 523. Instead, the court must examine the specific facts of each case. *General Tel. Co. of Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980). In determining numerosity, the court "may consider reasonable inferences drawn from facts before him at the stage of the proceedings." *Senter*, 532 F.2d at 523. This Court, in *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 105 F.R.D. 506 (S.D. Ohio 1985) found that as few as twentythree class members could satisfy the requisite numerosity. *Id.* at 508 ("Paraphrasing another district court's view of the first requirement of the rule, while 23 may not be a large number when compared to other classes that have been certified, it is a large number when compared to a single unit; there is no reason to encumber the judicial system with 23 consolidated lawsuits when one will do.") (*citing Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D.Pa. 1968)).

Plaintiff contends that there were 351 persons who had fines of $50 or less, and a total of over 1,000 persons who served time for fines only of various amounts (doc. 29). Plaintiff argues that these numbers exceed the range where joinder of all members would be practicable, citing *Richter v. Bowen*, 669 F. Supp 275, 281 n. 4 (N.D. Iowa 1987) (rule of thumb that a class of over forty persons is "sufficiently numerous for Rule 23 purposes") (*Id.*). Defendants argue that Plaintiff may not maintain a class action through presumptive or conclusory allegations, and that Plaintiff only presumes that his putative class members were indigent and unable to pay a fine, and presumes that only an extreme minority would choose incarceration rather than pay a $100.00 fine (*Id.*).

The Court may consider reasonable inferences drawn from facts before it in making the numerosity determination. In this case it is a reasonable inference that a significant number of the one thousand people incarcerated "on fines" were incarcerated, like Plaintiff, without an inquiry into whether they were indigent. A review of the seven trial transcripts filed by Plaintiff (doc. 22) suggests a pattern exists, and the affidavit of John Weber shows that only a partial review of court records reveals 32 cases of incarcerants committed on fines with no record of an indigency finding (doc. 21). The Court agrees that an extrapolation of the results of John Weber's review of court records reasonably indicates that nearly 200 persons were incarcerated on fines without an indigency hearing. For purposes of its numerosity analysis, the Court finds credible the proposition that an adequate number of indigent people were

incarcerated to render joinder impracticable. The numerosity requirement is met in this case.

B. Rule 23(a)(2): Commonality

In order to satisfy Rule 23(a)(2), there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement is satisfied "as long as the members of the class have allegedly been affected by a *general* policy of the defendant and the general policy is the focus of the litigation." *Day*, 144 F.R.D. at 333 (quoting *Sweet v. General Tire & Rubber Co.*, 74 F.R.D. 333, 335 (N.D. Ohio 1976)) (emphasis in original). The commonality test is qualitative, not quantitative. 1 Herbert B. *Newberg and Alba Conte*, Newberg on Class Actions, § 3.10 at 3-50 (3d ed. 1992). There need be only a single question of law or fact common to all members of the class. *Id.* "[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988).

Defendants argue that Plaintiff fails to establish commonality as there are factual distinctions among the putative class members that Plaintiff ignores in presuming all putative class members were not awarded indigency hearings, were in fact indigent, did not freely elect incarceration, and were not represented by counsel (doc. 15). Plaintiff contends that under *Day v. NLO, Inc.*, 144 F.R.D. 330, 333 (S.D. Ohio 1992) this requirement is satisfied "as long as the members of the class have allegedly been affected by a

general policy of the defendant, and the general policy is the focus of the litigation" (doc. 20). Plaintiff argues the commonality requirement is easily met as the focus of each putative class member's cause of action is the policy of not informing class members of their right to an indigency hearing, not making sure they are protected in court from being incarcerated for fines they cannot pay, and in fact incarcerating them for those fines (*Id.*). The Court finds Plaintiff's position well taken; Plaintiff has established commonality.

C. Rule 23(a)(3): Typicality

Rule 23(a)(3) also requires that "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). A representative's claim need not always involve the same facts or law to be typical, provided there is a common element of fact or law. *Senter*, 532 F.2d at 525 n.31. The typicality requirement ensures that the representative's interests will be aligned with those of the represented group and that the named plaintiff will also advance the interests of the class members. 1 Newberg, *supra*, § 3.13, at 3-75. "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Id.* at 3-76.

This analysis is necessarily intertwined with the analysis of commonality. The Court finds that both Plaintiff and some nearly 200 other individuals served time in jail on fines without an indigency hearing. The Court finds well-taken Plaintiff's position that his claims are precisely the same as those of the putative

class members. As such, the Court finds Plaintiff's interests to be aligned with those of the represented group, and that his claims meet the typicality requirement of Rule 23(a)(3). This leads to the final prerequisite of class certification, adequacy.

D. Rule 23(a)(4): Adequacy

Rule 23(a)(4) requires that the representative parties fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). There are two criteria for determining the adequacy of representation: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter*, 532 F.2d at 525; *Cross v. Nat'l Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977) (stating Rule 23(a)(4) tests "the experience and ability of counsel for plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent."). This adequacy requirement overlaps with the typicality requirement.

Defendants take no issue with the adequacy requirement. The Court finds that Plaintiff has common interests with the unnamed members of the class, and has confidence that his counsel are eminently qualified to vigorously prosecute the interests of the class. Therefore, the Court concludes that the prerequisites to Rule 23 have been met in this case. This does not end the Court's analysis, however. Once it is determined that the prerequisites to Rule 23

have been met, the Court must determine if the case is of a type which can be certified.

II. The Requirements Federal Rule of Civil Procedure 23(b)(3).

Rule 23(b)(3) provides that an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and if the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The County does not mention any problem under Rule 23(b)(3) concerning the predomination of common questions of law and fact. The Court similarly, sees no problem. As discussed above, the Hamilton County Public Defender's policy of not asking for an indigency hearing is common to the class as a whole. When weighed, on balance, the Court concludes that this issue predominates over any individual issues which might arise. A class action would be superior to the prosecution of separate actions. Accordingly, the Court

concludes that a class action is the proper vehicle for this lawsuit.

IV. CONCLUSION

For the reasons indicated herein, the Court finds Defendants' Motion for Summary Judgment well taken as to Defendant County Commissioners, Defendant Hamilton County, Defendant Sheriff Leis, and as to Plaintiff's malpractice claim. However, Plaintiff's remaining Section 1983 claims as to the Hamilton County Public Defender and the Hamilton County Public Defender Commission survive Defendants' Motion. The Court further finds Plaintiff's motion for class certification well-taken.

Accordingly, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion for Summary Judgment (doc. 23) to the extent that it DISMISSES Defendants Hamilton County Board of Commissioners, Hamilton County, and Hamilton County Sheriff Leis from this action, and DISMISSES Plaintiff's malpractice claim. The Court further GRANTS Plaintiff's Motion for Class Certification (doc. 12).

SO ORDERED.

Dated: August 23, 2005

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-3460

[Filed January 17, 2008]

MICHAEL POWERS,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
HAMILTON COUNTY PUBLIC DEFENDER COMMISSION, ET AL.,	)
	)
Defendants-Appellants.	)
	)

ORDER

BEFORE: NORRIS, COLE, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for

rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Norris would grant rehearing for the reasons stated in his dissent.

ENTERED THE COURT

/s/ Leonard Green
Leonard Green, Clerk